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Nos. 91-1111 and 91-1128

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

JOINT APPENDIX

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PETITIONS FOR WRITS OF CERTIORARI FILED JANUARY 10, 1992 (No. 91-1111) AND JANUARY 13, 1992 (No. 91-1128).

CERTIORARI GRANTED OCTOBER 5, 1992

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-16405, 89-16513 to 89-16531

IN RE INSURANCE ANTITRUST LITIGATION

On Appeal from the United States District Court
for the Northern District of California

RELEVANT DOCKET ENTRIES

DATE	EVENT
1990	
May 10	Plaintiffs' brief filed.
May 10	State of New York's supplementary brief filed.
May 10	United States' brief *amicus curiae* filed.
May 11	13 States' brief *amicus curiae* filed.
August 6	Defendants' brief filed.
August 6	London reinsurance appendix to defendants' brief filed.
August 6	Government of the United Kingdom's brief *amicus curiae* filed.
October 4	Plaintiffs' reply brief filed.
October 4	State of New York's supplemental reply brief filed.

DATE	EVENT
1991	
March 15	Case argued and submitted.
June 18	Opinion filed.
July 2	Defendants' petition for rehearing and suggestion for rehearing en banc filed.
August 7	Plaintiffs' consolidated response to defendants' petition for rehearing and suggestion for rehearing en banc filed.
October 15	Petition for rehearing denied.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. MDL 767

IN RE INSURANCE ANTITRUST LITIGATION

RELEVANT DOCKET ENTRIES

DATE	NO.	DESCRIPTION
1988		
March 22		California complaint (docket entry 1 in C-88-0981 WWS).
May 2	1	Pretrial order no. 1.
June 14		Connecticut complaint (docket entry 1 in CV-88-2332).
June 14	18	First amended complaint (as to C-88-0985).
June 17	275	Related case order.
September 6	311	First amended complaint (as to C-88-2341).
September 8	341	Pretrial order no. 2.
December 9	488	Pretrial order no. 3.
December 16	508	Foreign defendants' memorandum in support of motion to dismiss on comity grounds.
December 16	509	Appendix to no. 508.
December 16	513	Domestic defendants' memorandum in support of dismissal or summary judgment on McCarran-Ferguson Act grounds.

DATE	NO.	DESCRIPTION
December 16	515	Affidavit of Carole Banfield.
December 16	519	Domestic defendants' memorandum in support of motion for summary judgment on state action grounds.
December 16	522	Domestic defendants' state-by-state appendix.
1989		
January 3	540	Pretrial order no. 4.
March 7	757	Pretrial order no. 5.
March 29	763	Stipulation re suspension of plaintiff states' discovery against defendants.
March 31	764	Pretrial order no. 6.
April 28	836	Plaintiff states' unified brief in opposition to defendants' 12/16/88 filings.
April 28	837	Appendices to plaintiff states' unified brief.
June 23	848, 849, & 451	Defendants' reply memoranda in support of motions to dismiss and for summary judgment.
September 15	866	Argument on court's proposed opinion and order.
October 5	876	Plaintiff states' Rule 59(e) memorandum.
October 10	880	Revised opinion and order.
October 10	881	Revised judgment.
October 20 & November 6		Notices of appeal filed.
December 5	844	Transcript of 9/15/89 hearing on proposed opinion and order.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 88 0981 WWS

ANTITRUST; CLASS ACTION;
JURY DEMAND

THE STATE OF CALIFORNIA, on behalf of itself and all political subdivisions and special districts within the State similarly situated, CITY OF LAFAYETTE, CITY AND COUNTY OF SAN FRANCISCO, AND COUNTY OF SAN BENITO, PLAINTIFFS

v.

HARTFORD FIRE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AETNA CASUALTY AND SURETY COMPANY, CIGNA CORPORATION, INSURANCE SERVICES OFFICE, INC., PETER N. MILLER, ROBIN A.G. JACKSON, MERRETT UNDERWRITING AGENCIES MGT., LTD., THREE QUAYS UNDERWRITING LTD., JANSON, GREEN, LTD., EDWARDS AND PAYNE MANAGEMENT (U.A.), LTD., C. J. WARRILOW-HINE & BUTCHER, LTD., J. BRIAN HOSE & OTHERS, LTD., HARVEY BOWRING, LTD.—MURRAY LAWRENCE & PARTNERS, K.F. ALDER & OTHERS, (U.A.) LTD., D.P. MANN & OTHERS (U.A.) LTD., UNIONAMERICA INSURANCE CO., LTD., CNA RE (U.K.) LTD., TERRA NOVA INSURANCE CO., LTD., EXCESS INSURANCE GROUP, LTD., KEMPER REINSURANCE LONDON LTD., CONTINENTAL REINSURANCE CO. (U.K.) LTD., THOMAS A. GREENE & CO., INC., BALLANTYNE, MCKEAN & SULLIVAN, LTD., R.K. CARVILL & CO., LTD. GENERAL REINSURANCE CORPORATION, CONSTITUTION REINSURANCE CORPORATION, MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA, PRUDENTIAL REINSURANCE COMPANY, NORTH AMERICAN REINSURANCE CORPORATION, WINTERTHUR SWISS INSURANCE COMPANY, REINSURANCE ASSOCIATION OF AMERICA, DEFENDANTS

COMPLAINT

[Filed March 22, 1988]

PRELIMINARY STATEMENT

The State of California by its Attorney General John K. Van De Kamp, brings this action on its own behalf and on behalf of counties, municipalities and other local governmental units in California which purchase commercial general liability ("CGL") insurance and have been injured by defendants' violations of federal and state antitrust laws. Defendants include major insurance and reinsurance firms and their trade associations whose illegal collusion resulted in severe restrictions in the availability and affordability of insurance coverage for businesses and governmental entities.

The first four claims for relief concern the manipulation of the standard policy forms for coverage of commercial general liability risks. These forms, produced by defendant Insurance Services Office, Inc. ("ISO"), dominate the markets for the general liability insurance purchased by most insurance consumers. Anticonsumer revisions were made in the ISO CGL forms as the result of boycotts, threats, intimidation and other coercive conduct by defendants. Insurance coverage for pollution was completely excluded from the ISO CGL policy forms. Insurance coverage for prior events was also eliminated in the new ISO CGL "claims-made" insurance form. Moreover, the defendants' conspiratorial and coercive conduct caused a severe market-wide constriction of CGL insurance coverage, such that this coverage was unavailable to many businesses and governmental entities.

The fifth claim alleges that defendant reinsurance companies and others conspired to boycott the "occurrence form" of ISO's CGL policy to coerce insurers into offering the "claims made" form which affords consumers of insurance services far less actual insurance coverage. The sixth and eighth claims allege that domestic and foreign reinsurers boycotted, and withheld reinsurance from the coverage of pollution risks. The seventh claim concerns the conspiracy between ISO and other defendants to standardize both "Umbrella" and Excess insurance forms. The ninth, tenth and eleventh claims concern violations of California state statutes as a result of these same acts.

Plaintiffs seek declaratory and injunctive relief, civil penalties and threefold the damages sustained as a result of defendants' conspiracies in unreasonable restraint of trade.

I

JURISDICTION AND VENUE

1. This complaint is filed and the jurisdiction of the court is invoked under the provisions of 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. §§ 15 and 26 for monetary and declaratory and injunctive relief for injuries caused by defendants' violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Claims arising under California Business and Professions Code section 16700 et seq., commonly known as the Cartwright Act, California Insurance Code section 790, commonly known as the Unfair Insurance Trade Practices Act, and California Business and Professions code section 17200 et seq., commonly known as the Unfair Competition Act, are also stated herein, which this Court has jurisdiction over pursuant to principles of pendent jurisdiction.

3. Venue is proper in this District under Sections 4 and 12 of the Clayton Act (15 U.S.C. §§ 15 and 20) and 28 U.S.C. § 1391 because each of the defendants transacts business, has agents, resides or is found within the Northern District of California, and the claims alleged herein arose in the Northern District of California. Certain of the defendants are aliens as alleged below.

II

DEFINITIONS

4. As used in this complaint, the following terms are defined as:

a. "Commercial general liability" (CGL) insurance means insurance coverage for third party casualty damage claims against a purchaser of insurance (the "insured"). Purchasers of CGL insurance include governmental entities, not-for-profit corporations and businesses. CGL insurance does not include coverage for damage to the property of an insured.

b. "Occurrence form" means a liability insurance form that covers losses, whenever claimed, that occur during the policy period, The policy in force when the injury or loss occurs pays the claim, even if the claim is made after the policy has expired. Prior to 1984, occurrence coverage was the principal form used for CGL insurance.

c. "Claims-made form" means a CGL form under which the insured is liable only for those claims made during the policy period. It does not cover any claim that is received after the expiration date of the policy, even if the accident or event giving rise to the claim occurred during the effective dates of the policy. Prior to 1984, the claims-made form was not ordinarily used for CGL insurance.

d. "Dual form availability" means the availability of two standard CGL forms: an occurrence form and a claims-made form.

e. "Retroactive date" (Retro Date) means a provision in a claims-made insurance contract which excludes coverage for accidents or events that occurred prior to the specified retroactive date.

f. "Defense within limits" (also referred to as "defense cost containment", "defense cost within policy limits"; "defense cost cap") means a CGL policy provision which includes the insurers' defense costs as part of the stated policy limits. CGL insurance policies have historically included an obligation for the insurer to pay the full legal costs of defending a claim without regard to policy limits.

g. "Pollution exclusion" refers to the exclusion from the 1986 ISO CGL forms of all coverage for pollution claims, including claims alleging damage caused by "sudden and accidental" pollution. The 1986 ISO CGL forms eliminated all coverage for pollution exposures of plaintiffs herein.

h. "Tail" means the length of time during which an insurance company expects to receive claims arising from a certain risk covered by the insurance policy. Claims arising from "slips and falls" present the insurer with "short tail" exposure since all such claims will generally be known within a short time after their occurrence. Claims arising from environmental hazards such as asbestos pollution present insurers with "long tail" exposure because claims may be filed many years after the occurrence giving rise to such claim.

i. "Risk" means the hazard or type of potential accident for which insured seeks insurance protection. The term is also used within the industry to describe the insured itself, such as a "commercial risk" or a "municipal risk."

j. "Primary insurer" means an insurance company that sells insurance directly to consumers including businesses and governments.

k. "Insurance Services Office, Inc." or ISO is a not-for-profit corporation, with offices in San Fran-

cisco, California and New York, New York, which is a trade association for approximately 1,400 primary property/casualty insurance companies operating in the United States. One of ISO's functions is to develop standard policy forms and coverage parts for use by insurance companies.

l. "1973 ISO CGL form" means the standard CGL occurrence form and coverage parts developed by ISO in 1973, as amended prior to 1984.

m. "1984 ISO CGL forms" means the two CGL forms filed lodged or with state regulators in March 1984: an occurrence form and a claims-made form.

n. "1986 ISO CGL forms" means the two CGL forms filed by ISO with state regulators in 1986. These forms contained a complete pollution exclusion, and the claims-made form included a retroactive date.

o. "Reinsurance" means insurance for insurers. Reinsurance is a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company for a designated part of the insurance risks underwritten by the primary company.

p. "Treaty" means a contract by which a primary insurance company transfers to a reinsurer a portion of a category of risks which it will obligate itself to cover during the term of the treaty.

q. "Layer" or "layer of coverage" means a portion of risk taken on by either a primary insurer or reinsurer. Risks are layered in the sense that an insurer or reinsurer may have to respond only to claims above a certain amount but below another amount. For example, a reinsurer may have a contract or treaty to cover risk indemnification in excess of $1 million but less than $2 million. The primary insurer may retain the first million dollars in exposure, while other reinsurers may take on higher

risk exposure layers, in this example layers above the $2 million level.

r. "Underwriting" means the act of assessing a risk and calculating a premium to be charged by a company or syndicate.

s. A "syndicate" is a group of individual investors associated with Lloyd's of London. Syndicates can act as both insurers and reinsurers. Each syndicate utilizes the services of an active underwriter to make its underwriting decisions and conduct all other insurance related business.

t. "Lloyd's of London" is a marketplace composed of syndicates and is located in London, England. Lloyd's provides North American consumers with both reinsurance and insurance. Approximately half of Lloyd's casualty business involves North American risks.

u. A "lead underwriter" negotiates the terms of a reinsurance treaty which his syndicate or company will cover. A broker will then arrange for other syndicates or companies to join the treaty on the same conditions as that negotiated by the lead underwriter.

v. "London Company Market" means a group of insurance firms located in London outside of Lloyd's. These firms provide coverages for insurance and reinsurance, often by following the lead of a Lloyd's syndicate on the treaty in question.

w. "Sunset clause" means a provision included in a reinsurance treaty which limits the reinsurer's liability to those claims that are tendered by the reinsured primary company prior to a designated "sunset date." Thus a five year sunset clause means than the primary insurer will have no reinsurance coverage for claims presented later that five years after the inception of the treaty.

III

PLAINTIFF

5. The State of California, by its Attorney General, John K. Van de Kamp, brings this actions on its own behalf, on behalf of the class hereinafter described, and as *parens patriae* on behalf of the general welfare and economy of the State of California. City of Lafayette, City and County San Francisco, and City of San Benito are representative of public entities who compose the plaintiff class. The violations of federal and state law alleged herein have caused loss and damage and threaten continued loss and damage to the general welfare and economy of the State of California, as well as to individual members of the plaintiff class.

IV

CLASS ACTION ALLEGATIONS

6. Plaintiffs bring this action for declaratory and injunctive relief as well as for damages, pursuant to Rules 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of itself and all members of a class comprised of all governmental entities within the State of California except entities and institutions of the United States government, that have purchased or sought to purchase CGL insurance from the defendants or their co-conspirators during the period of the conspiracy alleged herein. It also includes public entities which, unable to purchase CGL insurance due to the actions of the defendants or their co-conspirators herein, sought and obtained other form(s) of indemnity protection from whatever source, including self insurance.

7. Plaintiffs State of California, City of Lafayette, City and County of San Francisco, and County of San Benito are members of the class; their claims are typical of the claims of all class members; and they will fairly and adequately protect the interests of the class.

8. The class is so numerous that joinder of all members is impracticable. It consists of thousands of governmental entities in California as described above.

9. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Questions of law and fact common to the members of the class predominate over any questions affecting individual members. The common questions of fact and law include the existence of the combination and conspiracies herein alleged, the extent to which members of the class were injured by the violation alleged, and the liability of defendants for the injury suffered by members of the class.

10. The claims of plaintiffs and other class members are identical, and the defenses will be identical with respect to each class member.

11. A class action is superior to any alternative method for the fair and efficient adjudication of this controversy.

V

DEFENDANTS

12. Defendants Merrett Underwriting Agencies, (hereinafter "(U.A.)" Management, Ltd., Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., C.J. Warrilow-Hine & Butcher Ltd., J. Brian Hose and Others, Ltd., Harvey Bowring, Ltd.-Murray Lawrence & Partners, K.F. Adler and Others (U.A.) Ltd., and D.P. Mann and Others (U.A.) Ltd., are underwriters for syndicates doing business through Lloyd's of London. These defendants contract for their syndicates to provide reinsurance and insurance on property and casualty risks throughout the United States, specifically including the Northern District of California.

13. Defendant Thomas A. Greene & Co., Inc. is a reinsurance broker with offices located in San Francisco and New York, which company provides brokerage services for the provision of reinsurance to insurance companies on risks throughout the United States, specifically including the Northern District of California.

14. Defendants Ballantyne, McKean and Sullivan, Ltd. and R.K. Carvill & Co., Ltd., are reinsurance brokers with offices in London, England, who arrange reinsurance coverages for U.S. insurance companies at Lloyd's and in the London Company market. These coverages concern risks located throughout the United States, specifically including the Northern District of California.

15. Defendant Robin A.G. Jackson was, at all times relevant herein, chief underwriter for Merrett (U.A.) Mgt., Ltd.'s Non-Marine Syndicates. Jackson is a citizen of the United Kingdom and resident of London, England. As Chief Underwriter for Merrett, Jackson provided reinsurance and insurance for casualty and property risks throughout the United States, specifically including the Northern District of California.

16. Defendant Peter North Miller was, at all times relevant herein, the Chairman of the Council of Lloyd's of London, the governing body of Lloyd's. Miller is a citizen of the United Kingdom and a resident of London, England. Miller conducted relevant business of Lloyd's of London and of the Council of Lloyd's throughout the United States, particularly including personal conduct of such business in the Northern District of California.

17. Defendants Terra Nova Insurance Co., Ltd., Unionamerica Insurance Co., Ltd., CNA Re (U.K.) Ltd., Excess Insurance Group, Ltd., Kemper Reinsurance London Ltd. and Continental Reinsurance Co., (U.K.) Ltd. are underwriting companies within the London Company Market, which provide reinsurance for property and casualty risks

throughout the United States, specifically including the Northern District of California.

18. Defendants General Reinsurance Corporation, Constitution Reinsurance Corporation, Prudential Reinsurance Company Mercantile, and General Reinsurance Corporation of America, and Northern American Reinsurance Corporation are United States corporations which provide reinsurance for risks throughout the United States, specifically including the Northern District of California.

19. Defendant Winterthur Swiss Insurance Company of Winterthur, Switzerland, provides reinsurance for risks throughout the United States, specifically including the Northern District of California.

20. Defendants Allstate Insurance Company, the Hartford Fire Insurance Company, Aetna Casualty and Surety Company, and CIGNA Corporation are United States corporations which provide insurance for risks throughout the United States, specifically including the Northern District of California.

21. Defendant Reinsurance Association of America (RAA) is a trade association of domestic reinsurers providing reinsurance on risks throughout the United States, specifically including the Northern District of Californa. The RAA's principal business consists of lobbying activity, and the RAA conducts such activity in the Northern District of California.

22. Defendant Insurance Services Office, Inc. (ISO) is a not-for-profit corporation with offices in San Francisco, California and New York, New York which develops rates and forms which are used by insurance companies in the sale of insurance throughout the United States specifically including the Northern District of California.

VI

CO-CONSPIRATORS

23. Various persons, firms, corporations or other business entities, known and unknown to plaintiffs, not made defendants participated as co-conspirators with the defendants in the violations alleged herein and performed acts and made statements in the furtherance thereof.

VII

BACKGROUND: CGL INSURANCE, REINSURANCE, STATE REGULATION AND ISO

A. *CGL Insurance*

24. Commercial General Liability ("CGL") insurance protects the insured from claims brought against it by others. For example, CGL insurance covers an accident involving a customer which occurs on a business' premises. The insured is the purchaser or consumer of the CGL insurance and is also known as the "risk." CGL insurance is purchased by businesses, non-profit groups and governmental entities such as cities or counties.

25. The basic insurance arrangement for CGL coverage is familiar. The contract between the insurance company and the insured is called a policy. The policy is written on a document known as a form. A policy is issued for a specific time period, e.g., one or three years, known as the policy period. Under the terms of the policy, the insurer agrees to pay valid claims which are covered by the policy. The insurer also agrees to pay a lawyer to defend the lawsuit and to bear other costs of the defense. The price the company charges for the policy is called a premium.

B. *Reinsurance*

26. Reinsurance is insurance for insurance companies. Only insurance companies purchase reinsurance. For a premium the reinsurance company agrees to indemnify

an insurance company for a portion of the risk originally assumed by the insurance company. The reinsurance company is known as the reinsurer and the insurance company is known as the primary or ceding company.

27. Reinsurance takes a variety of forms. The type of reinsurance most pertinent to this complaint is "treaty" reinsurance. Under a reinsurance treaty, the reinsurer agrees in advance with the reinsured to share a designated portion of specified classes of risks assumed by the reinsured during the treaty period. The treaty period may be any length of time, but is normally one year.

28. Reinsurance treaties are often underwritten by a number of reinsurers, each reinsurer assuming a percentage of the treaty's obligations.

29. Reinsurance serves at least two different purposes. One is to protect the primary insurance company from catastrophic losses. The other is to allow the primary insurance company to sell more insurance than its own financial capacity might permit without the reinsurance.

30. The principal markets for the supply of reinsurance of North American CGL risks are in the United States, London, and the European continent. The most important part of this London market is Lloyd's of London.

31. Lloyd's of London (Lloyd's) is composed of syndicates. Syndicates are separately capitalized, independently operated, competing firms. Lloyd's itself is not an insurance company, but rather a marketplace or exchange where syndicates transact their business. A "Lloyd's of London" policy may be underwritten by dozens of individual syndicates, each sharing a portion of the risk. The Lloyd's market provides reinsurance, as well as direct coverage in certain other unregulated markets in the United States.

32. Reinsurance is purchased by primary insurers either directly or through intermediary brokers. At

Lloyd's all reinsurance must be procured through a Lloyd's broker, admitted to the floor at the Lloyd's market.

33. In reinsurance markets, certain underwriters or firms, known as "lead" underwriters, are recognized as having special expertise in certain classes and lines of risks. A lead underwriter is the first to sign the reinsurance treaty, and normally establishes with a primary company's broker, or intermediary, the terms, conditions and price of the treaty. "Following" underwriters only join onto a treaty after a recognized lead reinsurer has signed off on the treaty. Lead underwriters therefore have an influence on the reinsurance market far beyond the percentage of the risks that they actually assume.

34. The availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers. Prudent insurers rely heavily on reinsurance to protect their balance sheets from unexpected losses.

C. *State Regulation of Insurance*

35. All fifty states regulate some aspects of the business of insurance. The extent of the regulation varies widely from state to state and depends on the type of insurance. Pursuant to state law, only "admitted" or licensed insurers such as defendants Hartford, CIGNA, Aetna, and Allstate are permitted to write CGL insurance, with one exception. That exception is for "surplus lines." Surplus lines are unusual lines of insurance for which coverage is nominally unavailable in the admitted market. For those lines, after the unavailability has been certified by a special broker, the policy may be written by a non-admitted company known as a surplus lines insurer. These non-admitted company policies are not regulated by the state.

36. States also do not regulate umbrella and excess coverages as to either forms or rates. Umbrella and excess insurance can be written by either admitted or non-admitted insurance companies, and are used by insurance consumers to obtain higher levels of protection for other liability insurance they may purchase.

37. Unlike primary insurance companies, the business of reinsurance companies is not regulated by the states, with only certain limited exceptions concerning financial solvency.

D. *Insurance Services Office*

38. The Insurance Services Office ("ISO") is a trade association consisting of approximately 1400 property/casualty insurers including defendants Hartford, Allstate, CIGNA, and Aetna. ISO was created in 1971 as a result of the merger of some eleven regional and national property and casualty rating bureaus. The member companies of ISO write approximately 95% of all casualty insurance written in the United States. These defendants have at all relevant times authorized ISO to file CGL policy forms with the California Insurance Commissioner.

39. ISO performs a variety of tasks for its member companies. Among other functions, it develops standard policy forms, collects historical loss and other data, projects future loss trends based on that data, and calculates advisory premium rates and rules for CGL and certain other lines of insurance.

40. ISO is headed by a Board of Directors and an Executive Committee which reports to the Board. Policy forms are developed by insurance company representatives sitting on standing committees such as the "Commercial Lines Committee." Defendants Hartford, Allstate, CIGNA, and Aetna all played leadership roles in the development of ISO CGL forms.

41. CGL insurance written by primary insurers in the United States, including defendants Hartford, Allstate,

Aetna and CIGNA, is predominately written on the ISO standard policy forms and coverage parts.

42. The dominance of the ISO CGL forms results from the monopoly position it has occupied since the 1971 merger referred to above. The first is ISO's actuarial function. ISO maintains a national statistical data base which records the actual performance ("loss history") of its policy forms in the marketplace.

43. For example with respect to the 1973 ISO CGL form, ISO collected, aggregated and interpreted data on the premiums charged, claims filed and paid, defense costs expended and many other categories of information which show precisely how this insurance product performed.

44. Applicable law in California, and other states also, permits ISO to act as a rating organization for its member companies. ISO projects future loss trends based on the data it has collected, and then calculates advisory rates for CGL and other lines of insurance.

45. Non-admitted companies in the surplus lines market often use ISO CGL forms, or parts thereof, to underwrite risks, including those of the plaintiff class.

VIII

TRADE AND COMMERCE AFFECTED

46. The activities of the defendants and their coconspirators and the restraints which are the subject of this complaint were and are within the flow of, and substantially affect, interstate commerce as more particularly described below.

47. During the period covered by this complaint the defendant insurance companies sold CGL insurance throughout California and the United States. Their customers included, among others, corporations engaged in interstate commerce as well as state and local governmental

entities. In 1986, CGL insurance premiums in the United States were $24.1 billion. Defendants Hartford, Allstate, Aetna, and CIGNA are providers of CGL insurance in California and throughout the United States.

48. Defendant reinsurance companies and syndicates provide reinsurance for CGL insurance and property insurance policies throughout California and the United States. Approximately one half of Lloyd's business covers North American risks. Income from U.S. CGL and property reinsurance premiums constitutes a substantial portion of all reinsurance premium income in both the U.S. and London.

49. During the period covered by this complaint, the sale of CGL insurance and reinsurance involved the following, among other things:

(a) Various channels of interstate communication, including telephone lines and the mails, were regularly used in the purchases of CGL and property insurance and reinsurance and in the development of the ISO CGL insurance forms described in this complaint;

(b) A substantial amount of the CGL insurance and property insurance that was purchased by plaintiffs came from outside California.

(c) Insurance forms for the sale of CGL insurance were developed by defendant ISO and other defendants, which forms were filed or lodged with the insurance regulators of each State of the United States;

(d) A substantial quantity of CGL insurance was sold nationwide on forms developed by defendant ISO; and

(e) Each defendant insurance company purchases a substantial quantity of reinsurance from outside the State in which it is located.

50. The illegal conduct challenged herein has had and may be expected to continue to have a not insubstantial effect on interstate trade and commerce as described in this complaint.

IX

FACTS

A. *The 1973 ISO Occurrence Form*

51. The conspiracies alleged herein occurred after ISO undertook to revise its standard CGL insurance form that had been in use since 1973.

52. The 1973 ISO form employed the traditional "occurrence" trigger of coverage that had long been used for CGL insurance. The standard occurrence policy language obligated the insurance company to pay or defend claims, whenever made, resulting from an accident or "injurious exposure to conditions" that occurred during the period the policy was in effect.

53. The 1973 ISO form covered claims relating to "sudden and accidental" pollution.

54. Another key provision of the 1973 ISO CGL form was that legal costs of defending claims were borne by the insurance company rather than the insured. A 1973 CGL policy for $1,000,000 worth of insurance coverage would provide fully that much protection for the insured, even if it cost $500,000 or even $1,000,000 in legal expenses to defend the claim.

55. In 1977 ISO began a project to substantially revise the 1973 occurrence form. This process resulted in a new set of CGL forms filed or lodged with state insurance regulators in March, 1984.

B. *The 1984 ISO Forms*

56. The 1984 ISO CGL forms differed from the 1973 ISO CGL form in one key respect relevant to this complaint: for the first time ISO filed two alternative CGL

forms, one with a traditional "occurrence" trigger of coverage and a second with a new "claims-made" trigger.

57. The "claims-made" concept was a major change in the way CGL insurance had always been written. The trigger of coverage for the occurrence form focused on when the accident or event itself *occurred* and it did not matter when the notice of the claim actually reached the insurance company. The trigger of coverage for the "claims-made" policy, on the other hand, was the *receipt* of the claim by the insurer. If the claim came in during the period the policy was in effect, it was covered. If the claim was filed after the policy had expired, it was not covered. Coverage for these future claims is entirely dependent upon the insured's ability to purchase claims-made CGL insurance in succeeding years.

58. The claims-made form provides much less protection against long tail losses than an "occurrence" form. It shifts the risk of uncertainty for claims filed in the future from the insurer to the insured. Claims-made policies can be used by insurers to cut off liability for claims reported in the future by refusing insurance renewals to insureds who experience an increased or unexpected trend in claims.

59. As originally filed by ISO, the 1984 claims-made CGL form did not include a "retroactive date" provision. Inclusion of a "retroactive date" provision has the effect of cutting of all coverage for occurrences prior to the retroactive date. Without a retroactive date an injury in 1976 that was not filed with the insurance company until 1984 would be covered by the 1984 claims-made policy.

60. Other key aspects of the two 1984 ISO forms, however, were identical to the 1973 CGL form. Most important, both new forms continued to cover damage caused by "sudden and accidental" pollution. In addition, legal defense costs would continue to be borne by the insurance company without regard to the policy limit.

61. Within ISO, defendant Hartford opposed the proposed CGL forms on the grounds that: (a) the occurrence form should have been eliminated entirely in favor of issuing solely a claims-made form; (b) the claims-made form should have included a standard retroactive date provision; (c) pollution coverage should have been totally excluded by elimination of the coverage for "sudden and accidental" pollution coverage; and (d) defense costs payable under the policy by the insurer should have been limited by including defense costs within the policy limits. Defendant Allstate opposed the claims-made form because it contained no standard retroactive date provision.

62. The majority of ISO Executive and Commercial Lines Committee members, however, supported the proposed CGL forms and rejected the changes proposed by defendants Hartford and Allstate. On December 15, 1983 the new CGL forms were approved by the ISO Board of Directors. ISO filed or lodged the two new CGL forms with state regulators in March, 1984.

C. *RAA's Response to the 1984 Forms*

63. After their positions were rejected by a majority of ISO, certain primary insurance companies, including defendants Hartford, CIGNA, Aetna and Allstate, exerted concerted pressure on ISO staff and other ISO Company members in an effort designed to have the CGL forms withdrawn and to restrict CGL coverage available to the consumer under any new CGL forms.

64. On March 2, 1984 representatives of Hartford met with representatives of General Re, the largest American reinsurer. The purpose of the meeting was to formulate a joint strategy to force changes in the 1984 ISO CGL forms. At this meeting Hartford and General Re agreed to either coerce ISO to adopt their demands or, failing that, "derail" the entire ISO CGL forms program.

65. At an RAA Executive Committee meeting held March 13, 1984, in furtherance of its agreement with

Hartford, General Re initiated a coordinated effort with the RAA to force revisions in the ISO CGL forms program. As part of their effort, on May 26, 1984 the RAA Executive Committee created a "CGL Committee" consisting of defendants General Re, Mercantile & General, Constitution Re, North American Re and Winterthur Swiss.

66. At a June 15, 1984 meeting of the RAA "CGL Committee," defendants named in paragraph 65 agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both forms.

67. In a letter to ISO dated June 19, 1984, RAA announced that its members would not provide reinsurance for coverages written on the 1984 CGL forms.

68. Defendants General Re and Hartford also enlisted Thomas A. Greene, President of defendant Thomas A. Greene & Co., Inc., to announce the boycott message to ISO in a widely-reported speech to the ISO Board of Directors on June 21, 1984. Greene stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL forms.

D. *Lloyd's of London's Response*

69. Defendants Hartford, Aetna, CIGNA and Allstate, in addition to conspiring with General Re and the RAA, also encouraged a boycott of the 1984 CGL forms by key Lloyd's of London syndicates, including the lead underwriters for North American casualty reinsurance. As with the RAA conspiracy, the common goal of the London reinsurers, as well as the primary insurer defendants, was to coerce ISO and its members to withdraw the 1984 CGL forms and issue a more restrictive CGL form. These anti-consumer restrictions would include an end to all coverage for pollution liability and the addition of a retroactive date on a new claims-made form.

70. Defendants Hartford, Allstate, CIGNA, Aetna and others communicated to several lead Lloyd's of London syndicates, including defendants Merrett Syndicates, Edwards and Payne (U.A.) Ltd., and Three Quays Underwriting Management Ltd., their desire to restrict the ISO CGL coverage.

71. As early as April 23, 1984 ISO learned that defendant Robin Jackson of Merrett Syndicates, Ltd., a highly renowned lead underwriter in the North American casualty reinsurance market, was planning to withhold reinsurance from the market for primary companies using the new ISO forms.

72. In late May 1984, ISO, in recognition of Lloyd's power as a reinsurer of the United States CGL market, arranged a visit to London for July, 1984 to explain and promote the March filed forms to the London market.

73. Prior to the July London meetings, Hartford and Allstate enlisted the aid of intermediary brokers Thomas A. Greene, and Nick Graham of R.K. Carvill & Co. to maximize the London reinsurance market's pressure on ISO to change its CGL forms.

74. While ISO staff were in London to discuss the March 1984 ISO CGL forms, London reinsurers including Tim Holloway and J. Brian Hose & Others Ltd. and Cyril Warrilow of C.J. Warrilow—Hine & Butcher, Ltd., threatened a boycott of North American CGL risks unless four key demands were met:

(a) The elimination of any ISO CGL occurrence form;

(b) The addition of a retroactive date to a new revised CGL claims-made form;

(c) The exclusion of any pollution liability coverage from any CGL form; and

(d) Defense costs within limits.

75. These demands were conveyed to ISO staff in meetings with individual syndicates and companies in the London market, and at a dinner at the Garrick Club hosted by ISO on July 4, 1984. In attendance at the dinner were the leading Lloyd's underwriters of U.S. casualty reinsurance, including Robin A.G. Jackson of the Merrett Syndicates, Richard Hazell of Three Quays Syndicate, Charles Skey of the Edwards and Payne Syndicates and Gale Coles of the Janson, Greene Syndicate. ISO staff reported that the dinner attendees were "almost militant" in their resolve to eliminate coverage of CGL risks on the occurrence form.

76. After returning from London, ISO staff met with defendant Hartford at its headquarters in Connecticut. By this time the threat of a reinsurance boycott unless key changes were made in the 1984 ISO CGL forms was known within ISO as "the Hartford problem." Defendant Hartford continued to insist upon the coverage restriction revisions described in paragraphs 61 and 74.

77. Sometime between August 12 and August 22, 1984, ISO staff, in a reversal of its own previous position on these matters, agreed to recommend that key provisions of the 1984 CGL forms be reconsidered and revised as demanded. On August 23, 1984, under pressure from defendants, the Commercial Lines Committee of ISO capitulated and reversed its positions on the retroactive date and pollution exclusion. Later that same day, the ISO Executive Committee decided that a final decision on these revisions to the forms should await their next meeting on September 20, 1984.

E. *The September 20, 1984 Agreement*

78. As demanded on August 23rd by defendants Hartford and Aetna, ISO invited representatives of both the foreign and domestic casualty reinsurance markets to the September 20, 1984 Executive Committee meeting. Never before had representatives of the domestic or foreign re-

insurance markets been invited to speak at an ISO Executive Committee meeting.

79. Eight representatives of what were major sources of reinsurance for all of ISO's member companies were invited to attend both the September 20 meeting and a dinner with the Committee to be hosted by ISO the evening before. These representatives were:

(a) Ronald Ferguson and John Etling, Chairman and President, respectively, of General Re;

(b) N. David Thompson, President of North American Re;

(c) George Nimmo, President of Prudential Re and the Chairman of the RAA at the time;

(d) Andre Maisonpierre, President of RAA;

(e) Robin Jackson of the Merrett Syndicates;

(f) Richard Hazell of Three Quays Ltd.; and

(g) Gale Coles of the Janson, Greene Syndicates.

ISO staff also contacted six other Lloyd's reinsurers and encouraged them to convey their views on the scheduled issues to Jackson, Hazell and Coles.

80. During the evening of September 19, 1984 Ferguson and Etling of General Re, Thompson of North American Re, Nimmo of Prudential Re and Chairman of the RAA, Maisonpierre, the RAA president, and ISO officers dined at the Board Room, a private club in New York City. At this dinner the reinsurers communicated to ISO Board Members present their agreed positions on the CGL revision issues set for an ISO Executive Committee vote the next day.

81. Of the eight reinsurer representatives invited by ISO, only Hazell and Coles could not attend the September 20 meeting. With advance knowledge of this fact in mind, ISO had urged Hazell and Coles to convey their views to

Jackson before the meeting. Jackson conferred with at least Hazell and Coles before attending the meeting at ISO's headquarters in New York.

82. At the ISO Executive Committee meeting of September 20, 1984 the foreign and domestic reinsurer representatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance.

83. As of September 20, 1984 ISO members were already aware of emerging capacity problems in the CGL reinsurance markets and the difficulties they would face in the renewal of their casualty treaties for 1985. A reinsurance boycott at that time would be devastating for ISO members.

84. After the reinsurance representatives spoke, the ISO Executive Committee voted to include a retroactive date in the claims-made form, to exclude all pollution coverage from both new forms, and to defer to a later date the revision of the forms on the defense cost containment issue. ISO did not change its existing plan to offer a new occurrence form along with the new claims-made form. The 1984 ISO CGL forms were thereafter withdrawn from the marketplace and replaced with new substitute CGL forms which include the coverage restrictions insisted upon by the defendant reinsurers and insurance companies. The final version of the revised forms were filed and/or lodged with state regulators in 1986.

85. In furtherance of the agreements reached on September 20, 1984, defendants ISO, Hartford, Aetna, and a "London reinsurer" combined to form an "ISO Team" to market the new forms. This scheme included coordinated speeches before groups of insurance brokers and agents to convince them that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the ISO forms were not approved. The scheme also

included plans to effect their agreement to add a defense within limits provision to the CGL forms.

F. *The Occurrence Form Boycott*

86. Even after their victory at the ISO Executive Committee meeting on September 20, 1984, defendant Peter North Miller, defendant Lloyd's reinsurers, including Robin A.G. Jackson of the defendant Merrett Syndicates and Richard Hazell of defendant Three Quays Syndicates, defendants Janson, Green, Ltd., Edwards and Payne Syndicates, Ballantyne, McKean & Sullivan, Ltd. and their co-conspirators, continued their attempt to eliminate the occurrence form as an option for most risks and to make the restrictive claims-made form the standard CGL policy form.

87. As a means of coercing the insurance market to accept the claims-made form, Lloyd's reinsurers employed two primary strategies:

a) public and private pronouncements that there would be no reinsurance for primary insurers writing on the occurrence form, and

b) the redesign of reinsurance treaties to eliminate coverage for "long tail" risks, thereby leaving the primary insurer without reinsurance protection for claims reported in the future. This exclusion became known as the "sunset clause".

88. In furtherance of the first strategy, Lloyd's reinsurers, including lead underwriters Robin Jackson and Richard Hazell, collectively refused to write new treaties for or to renew long-standing treaties with, primary U.S. insurers unless they were prepared to switch from the occurrence to the claims-made form. Primary insurers who did not evidence a strong intention to commit to claims-made were left either without reinsurance coverage or with very low limits of coverage, even though the

claims-made form itself had not yet been approved for use in many jurisdictions.

89. Representatives of Lloyd's including defendant Peter North Miller, then, and at all relevant times, the Chairman of Lloyd's, also appeared in various public forums and in the trade press to present their agreed upon position that Lloyd's of London was withdrawing entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form. In furtherance of this effort, Robin Jackson circulated a series of letters to brokers, clients and fellow reinsurance syndicates pressing for further changes in the ISO forms, including the elimination of the option of an occurrence form for any CGL risk.

90. A second stratagem employed by Lloyd's of London reinsurers, including defendants, was to impose a "sunset clause" restriction within their treaties with U.S. primary insurance companies that effectively eliminated coverage for "long tail" risks written on the occurrence form.

91. After the so-called "sunset date", reinsurance coverage expires and the U.S. primary insurer becomes fully answerable for all losses without the benefit of reinsurance indemnity. The "sunset clause" was intended to force primary insurers to stop writing occurrence coverage, and to substitute claims-made coverage, for all risks except very small risks.

92. During 1985 and early 1986, London reinsurers, acting in conjunction with intermediary brokers, including defendant Ballantyne, McKean and Sullivan, Ltd., combined to impose sunset clauses in reinsurance treaties for U.S. primary casualty insurance written on an occurrence form basis.

G. *The Pollution Liability Coverage Boycott*

93. In addition to the boycott of the occurrence form in general, by no later than January 1, 1986, reinsurers in London also boycotted reinsurance for pollution lia-

bility coverage in particular, even if written on a claims-made form. This conspiracy had the effect of drastically restricting the availability and affordability of pollution liability coverage in the United States, including California.

94. The boycott was accomplished by joint agreement between lead Lloyd's of London underwriters and leading reinsurance firms in the London company market to exclude all pollution liability coverage from "casualty" reinsurance treaties, beginning at least by late 1985 and continuing to the present. Participating Lloyd's syndicates included the defendants Merrett Syndicates, Three Quays Syndicates, Edwards and Payne Syndicates, C.J. Warrilow —Hine and Butcher Ltd., Harvey Bowring—Murray Lawrence & Partners, K.F. Alder and Others, and D.P. Mann and Others. Participating London company market defendants included Unionamerica Insurance Co., CNA Re (U.K.) and Terra Nova Insurance Co.

95. On November 6, 1985, at a meeting of these lead underwriters at the offices of defendant Ballantyne, McKean and Sullivan, Ltd., those present agreed that all North American casualty reinsurance treaties, including coverage for CGL, would be written with a total pollution exclusion.

96. The complete exclusion of pollution coverage from casualty reinsurance treaties had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers that had potential pollution liability exposures, such as municipalities, could not find primary insurers willing to provide even "sudden and accidental" coverage for such consumers.

H. *ISO's Withdrawal Of Support For The 1973 CGL Forms*

97. As a result of the boycott, coercion and intimidation described herein, ISO succeeded in obtaining regulatory approval in most states where such approval is

needed for its revised CGL forms, both a new revised occurrence form and the revised claims-made form.

98. In California there is no regulatory approval process for CGL forms and as such no approval was sought or obtained.

99. On July 1, 1987, ISO officially withdrew its "support" of the 1973 CGL form. "Support" in this context includes the normal data collection and actuarial services performed by ISO in aid of its member companies. Without such support, most ISO members could not continue to use the 1973 occurrence form, because it is very difficult and expensive for any single company to duplicate the critical ISO support functions.

100. Although many insurance consumers preferred the 1973 CGL forms, the market for this type of coverage has all but disappeared.

I. *ISO's Standardized CGL Insurance Policy For The Excess And Umbrella Markets*

101. Beginning no later than November 10, 1985, ISO staff and ISO members, including defendants Hartford, Aetna and CIGNA, agreed that ISO staff should begin developing standardized CGL umbrella and excess policy language. This decision was made despite the fact that ISO, as the trade association for admitted property/casualty primary insurance companies, plays no authorized role in the unregulated excess and umbrella markets. "Excess" insurance is a specialized form of insurance normally not offered by admitted insurers on a regulated basis. "Excess" refers to a layer of insurance, a higher level of indemnity protection, that sits on top of either a self-insurance program, often referred to as a "retention", or a primary insurance policy. "Umbrella" coverage is similar to excess insurance and likewise is not normally offered on a regulated basis.

102. After the introduction of the new versions of the ISO CGL forms, ISO had begun to receive pressure from domestic reinsurers, London reinsurers, and others to develop standardized policy language for CGL excess and umbrella forms which would conform to the revised ISO CGL forms.

103. On January 14, 1986, the ISO Board of Directors approved a recommendation that the ISO staff develop standardized excess and umbrella policy forms language for broad distribution.

104. Early drafts of the standardized policy language were written by defendant Allstate, co-conspirator Safeco, ISO staff members and others. Comments were solicited and received from defendants Merrett Syndicates, Three Quays Syndicates, co-conspirator H.S. Weavers Underwriting Agencies Ltd., (a leading London company market excess insurer) and others in the reinsurance and excess insurance markets.

105. On June 15, 1986 the ISO Executive Committee released standardized Model CGL excess and umbrella policy language, coverage parts and endorsements with the following provisions, among others:

a) a retroactive date in the claims-made version;

b) an absolute pollution exclusion in both versions; and

c) defense costs within the policy limits for both versions.

J. *The Pollution Property Coverage Boycott*

106. Specialized reinsurers in London and the United States have also subsequently agreed to boycott reinsurance and insurance policies for U.S. and Canadian property seepage and pollution exposures. These companies include Unionamerica Insurance Co., Ltd., Terra Nova Insurance Co., Ltd., Excess Insurance Co., Ltd., Edwards

and Payne Syndicates Ltd., Kemper Reinsurance London Ltd., Merrett Syndicates, Ltd., Continental Re (U.K.) Ltd., and other unnamed co-conspirators. This conspiracy has had the effect of drastically restricting the availability and affordability of property pollution coverage in the United States, specifically including California.

107. The agreement to boycott the provision of property pollution insurance and reinsurance for North American exposures is memoralized in a document entitled "Non Marine London Market Agreement 1987" (hereinafter "Market Agreement"). This Market Agreement is signed by over forty LMX Retrocessional reinsurers both at Lloyd's and in the London Company Market. Retrocessional reinsurance means the reinsurance of the business written by reinsurers, while "LMX" is the short hand for those retrocessional reinsurers who specialize in providing such reinsurance for the Lloyd's and London Company Market Companies.

108. The parties to the Market Agreement agreed to use their "best endeavors to ensure that all U.S.A. and Canadian exposed insurance reinsurance business attaching on or after 1st January, 1987 will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable."

109. The Market Agreement to boycott property pollution coverage was subsequently agreed to by at least twenty-nine North American retrocessional reinsurers of the LMX Market.

110. The agreed upon exclusion of seepage and pollution risks from property insurance and reinsurance policies has had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers who sought coverage for property exposures were no longer able to find primary insurers willing to provide such coverage.

FIRST CLAIM FOR RELIEF

DOMESTIC CONSPIRACY

(CONSPIRACY OF PRIMARY INSURERS, THE RAA AND MEMBERS OF THE RAA TO COERCE ISO TO ADOPT RESTRICTIVE TERMS AND CONDITIONS IN ITS CGL FORMS)

111. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-68 above with the same force and effect as if here set forth in full.

112. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants RAA, General Re, Constitution Re, Mercantile and General Re, Prudential Re, North America Re, Winterthur Swiss, Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc. and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

113. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' terms.

114. For the purpose of forming and effectuating such contracts, combination and conspiracies, defendants named in paragraph 112 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the terms under which they would reinsure CGL risks;

(b) agreeing to boycott the 1984 ISO CGL forms, unless they were amended to comply with defendants' terms; and

(c) coercing and intimidating ISO and ISO members to adopt the coverage terms and exclusions agreed upon by defendants.

115. This contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policy available in the State of California excludes all pollution liability coverage;

(b) the standard CGL claims-made policy available in the State of California excludes retroactive coverage;

(c) the price of pollution liability coverage, where it is available, has been increased;

(d) competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained.

SECOND CLAIM FOR RELIEF

FOREIGN CONSPIRACY

(CONSPIRACY OF LLOYD'S OF LONDON REINSURERS AND PRIMARY INSURERS TO COERCE ISO TO ADOPT RESTRICTIVE TERMS AND CONDITIONS IN ITS CGL FORMS)

116. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-77 above with the same force and effect as if here set forth in full.

117. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Merrett (U.A.) Mgt., Ltd., Robin A.G. Jackson, Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., C.J. Warrilow-Hine & Butcher, Ltd., J. Brian Hose & Others, Ltd., J. Brian Hose & Others, Ltd., R.K. Carvill & Co., Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc., and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

118. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' terms.

119. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 117 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the coverage terms and exclusions under which they would reinsure North American CGL risks;

(b) agreeing to boycott the 1984 ISO CGL forms unless they were amended to comply with defendants' terms; and

(c) coercing and intimidating ISO and ISO members to adopt the coverage terms and exclusions agreed upon by defendants.

120. The aforesaid contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policy available in the State of California excludes all pollution liability coverage;

(b) the standard CGL claims-made policy available in the State of California excludes retroactive coverage;

(c) the price of pollution liability coverage, where it is available, has been increased;

(d) competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained.

THIRD CLAIM FOR RELIEF

JOINT CONSPIRACY

(CONSPIRACY OF PRIMARY INSURERS, RAA MEMBERS AND LLOYD'S OF LONDON REINSURERS TO COERCE ISO TO ADOPT RESTRICTIVE TERMS AND CONDITIONS IN ITS CGL FORMS)

121. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-83 above with the same force and effect as if here set forth in full.

122. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Merrett (U.A.) Mgt. Ltd., Robin A.G. Jackson, Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., RAA, General Re, Constitution Re, Mercantile and General Re, Prudential Re, North American Re, Winterthur Swiss, Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc. R.K. Carvill & Co. and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsur-

ance coverage of CGL risks and the market for primary coverage of CGL risks.

123. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' coverage terms and exclusions.

124. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 122 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the terms under which they would reinsure CGL risks and jointly communicating those terms to the ISO Executive Committee on September 20, 1984;

(b) agreeing to boycott the proposed 1984 ISO CGL forms unless they were amended to comply with defendants' terms; and

(c) coercing and intimidating ISO and ISO members to adopt the terms agreed upon by defendants.

125. The aforesaid contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policy available in the State of California excludes all pollution liability coverage;

(b) the standard CGL claims-made policy available in the State of California excludes retroactive coverage;

(c) the price of pollution liability coverage, where it is available, has been increased; and

(d) competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained.

FOURTH CLAIM FOR RELIEF

GLOBAL CONSPIRACY

(CONSPIRACY OF ISO, PRIMARY INSURERS, RAA MEMBERS AND LLOYD'S OF LONDON REINSURERS TO STANDARDIZE THE TERMS AND CONDITIONS OF CGL INSURANCE COVERAGE)

126. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-85 above with the same force and effect as if here set forth in full.

127. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants ISO, Merrett (U.A.) Mgt., Ltd., Robin Jackson, Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.), Ltd., RAA, General Re, Constitution Re, Mercantile and General Re, Prudential Re, North American Re, Winterthur Swiss, Hartford, Allstate, CIGNA, Aetna, Thomas A. Greene & Co., Inc., R.K. Carvill Co., Ltd., and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

128. This contract, combination and conspiracy consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to eliminate pollution coverage from the 1984 ISO CGL forms, as had been demanded by the defendants named above,

(b) to eliminate retroactive coverage from the 1984 ISO CGL claims-made form;

(c) to agree to limit defense costs to the limits of the policy in any ISO CGL policy form.

129. For the purpose of forming and carrying out this contract, combination and conspiracy, the defendants named in paragraph 127 and co-conspirators did those things which they conspired to do, including, but not limited to:

(a) conducting meetings and discussions among themselves to agree on the terms to be included in the ISO CGL forms; and,

(b) agreeing to incorporate the retroactive date coverage term and pollution liability exclusion language in the 1986 ISO forms.

(c) agreeing to further revise the ISO CGL forms to provide for defense costs within limits, but agreeing to delay each revision until the changes in the retroactive date and pollution exclusion terms were introduced to the market and insurance regulators, where necessary.

130. This contract, combination and conspiracy has had the following effects, among others:

(a) the standard ISO CGL policies available in the State of California incorporate terms demanded by defendants, i.e. a pollution exclusion and a retroactive date;

(b) the price of pollution liability coverage and retroactive claims-made coverage, where it is available, has increased;

(c) competition in the markets for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained; and

(d) defense within limits is, or will be, a standard provision of CGL policies.

FIFTH CLAIM FOR RELIEF

CONSPIRACY OF LLOYD'S OF LONDON REINSURERS TO COERCE PRIMARY INSURERS TO OFFER COVERAGE ON A CLAIMS-MADE BASIS

131. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-92 above with the same force and effect as if here set forth in full.

132. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Peter North Miller, Robin A.G. Jackson, Merrett (U.A.) Mgt., Ltd., Three Quays Underwriting Management Ltd., Janson, Green, Ltd., Edwards and Payne (U.A.) Ltd., Ballantyne, McKean and Sullivan, Ltd. and other co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks written on the occurrence form and the market for primary coverage of CGL risks on the occurrence form.

133. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which reinsurance coverage would be provided for CGL risks;

(b) to refuse to reinsure those CGL risks written on an occurrence form; and

(c) to eliminate reinsurance coverage for "long-tail" risks covered by occurrence policies.

134. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 132 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the terms under which reinsurance would be made available for North American CGL risks;

(b) agreeing to structure, promote and publicize a boycott of reinsurance for North American CGL risks by refusing to reinsure any other than those risks written on a claims-made CGL form, or by offering such reinsurance only when it was itself written on a claims-made basis; and

(c) coercing and intimidating primary insurers to use the claims-made form and reject the occurrence form; and

(d) coercing and intimidating individuals who had spoken to, or had reason to so address, or might have commercial interest in speaking to, regulatory and/or legislative bodies or officials concerning that body's or official's approval of the adoption or use of the claims-made CGL form so as to influence or determine said individual's presentation to said officials or bodies.

135. The aforesaid contract, combination and conspiracy has had the following effects, among others:

(a) the market for occurrence CGL coverage available in the State of California was unreasonably restrained;

(b) occurrence CGL coverage became unavailable in the State of California for many risks, including municipal general liability risks;

(c) the price of occurrence liability coverage, where it is available, has been increased.

SIXTH CLAIM FOR RELIEF

POLLUTION BOYCOTT I

(CONSPIRACY OF LLOYD'S OF LONDON REINSURERS, BROKERS AND LONDON COMPANY MARKET REINSURERS TO BOYCOTT POLLUTION COVERAGE)

136. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-100 above with the same force and effect as if here set forth in full.

137. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants, Merrett (U.A.) Mgt., Ltd., Harvey Bowring, Ltd.—Murray Lawrence & Partners; K.F. Alder and Others (U.A.), Ltd., Edwards and Payne (U.A.), Ltd., D.P. Mann and Others (U.A.) Ltd., C.J. Warrilow-Hine and Butcher, Ltd., Unionamerica Insurance Company, Ltd., Terra Nova Insurance Co., Ltd., CNA Re (U.K.) Ltd., and Ballantyne, McKean and Sullivan, Ltd., and other co-conspirators, have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for casualty reinsurance coverage for pollution risks and the market for primary casualty coverage of pollution risks.

138. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which casualty reinsurance coverage would be provided for CGL risks;

(b) to limit the availability of pollution coverage in U.S. primary casualty insurance.

139. For the purpose of forming and effectuating such contracts, combination and conspiracies, defendants named in paragraph 137 and co-conspirators did those things

which they combined and conspired to do, including but not limited to the following:

(a) conducting meetings and discussions among themselves to agree on the exclusive terms under which they would reinsure North American CGL risks;

(b) agreeing to exclude from all casualty treaty reinsurance written in London all pollution coverage for North American risks.

140. This contract, combination and conspiracy has had the following effects, among others:

(a) pollution liability coverage has become almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California;

(b) the price paid by plaintiffs for pollution liability insurance coverage, where it is available, has dramatically increased; and

(c) competition in the market for pollution liability coverage has been unreasonably restrained.

SEVENTH CLAIM FOR RELIEF

(CONSPIRACY BY ISO, REINSURERS AND INSURERS TO RESTRAIN TRADE IN THE COMMERCIAL UMBRELLA AND EXCESS INSURANCE MARKETS)

141. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-105 above with the same force and effect as if here set forth in full.

142. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, defendants ISO, Allstate, Hartford, Aetna, Merrett (U.A.) Mgt., Ltd. and Three Quays Underwriting Management Ltd, and unnamed co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the markets for commercial umbrella and excess insurance coverages.

143. Such contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were to restrict terms and conditions under which insurance coverages would be available to purchasers of commercial umbrella and excess insurances.

144. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 142 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree to draft "Model" forms and policy language for both umbrella and excess insurance coverages;

(b) Agreeing upon, drafting, and then promulgating such "Model" forms and policy language for use in the umbrella and excess insurance markets.

145. This aforesaid contract, combination and conspiracy has had the following effect, among others:

(a) Competition in the unregulated markets for commercial umbrella and excess insurance has been unreasonably restrained.

EIGHTH CLAIM FOR RELIEF

POLLUTION BOYCOTT II

(LLOYD'S OF LONDON, LONDON COMPANY MARKET AND DOMESTIC RETROCESSIONAL REINSURER BOYCOTT OF PROPERTY POLLUTION COVERAGES)

146. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-110 above with the same force and effect as if here set forth in full.

147. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Unionamerica Insurance Co., Ltd., Terra Nova Insurance Co., Ltd., Excess Insurance Group Ltd., R.A. Edwards Syndicates Ltd., Kemper Reinsurance London Ltd., Merrett (U.A.) Management Ltd., Continental Reinsurance Co. (U.K.) Ltd., and unnamed co-conspirators have engaged in an unlawful contract, combination and conspiracy in unreasonable restraint of trade and commerce in the market for property insurance coverages for seepage, pollution and contamination exposures situated in North America, including the State of California.

148. This contract, combination and conspiracy consisted of a continuing agreement, understanding and concert of action among such defendants and their co-conspirators, the substantial terms of which were:

(a) to restrict the terms under which property insurance and reinsurance coverage would be provided for North American risks;

(b) to limit the availability of property insurance and reinsurance for North American risks.

149. For the purpose of forming and effectuating such contracts, combinations and conspiracies, defendants named in paragraph 147 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) conducting meetings and discussions among themselves to agree to coverage terms and exclusions for primary and reinsurance coverages for North American property insurance;

(b) agreeing to boycott the provision of all retrocessional reinsurance for any U.S. or Canadian primary or reinsurance property coverages unless the original insurance coverage includes a seepage, pollution and contamination exclusion clause;

150. This contract, combination and conspiracy has had the following effects, among others:

(a) property insurance and reinsurance policies written for U.S. and Canadian property risks, including all such risks in the State of California, now exclude a seepage, pollution and contamination clause;

(b) the prices for seepage, pollution and contamination property insurance coverages, where they are still available, have been increased;

(c) competition in the market for property seepage, pollution and contamination coverages has been unreasonably restrained.

NINTH CLAIM FOR RELIEF

STATE LAW CLAIM I

(VIOLATIONS OF THE CARTWRIGHT ACT, CALIFORNIA BUSINESS & PROFESSIONS CODE § 16700 ET SEQ.)

151. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-150 above with the same force and effect as if here set forth in full.

152. The aforesaid agreements, combinations, and conspiracies in unreasonable restraint of trade and commerce are in violation of California Business and Professions Code section 16720 et seq., commonly known as the Cartwright Act.

TENTH CLAIM FOR RELIEF

STATE LAW CLAIM II

(VIOLATIONS OF THE UNFAIR INSURANCE TRADE PRACTICES ACT, CALIFORNIA INSURANCE CODE § 790 ET SEQ.)

153. Plaintiffs repeat and reallege every allegation contained in paragraphs 1-150 above with the same force and effect as if here set forth in full.

154. The aforesaid agreements, combinations and conspiracies in unreasonable restraint of trade and commerce are in violation of California Insurance Code section 790 et seq., commonly known as the Unfair Insurance Trade Practices Act.

ELEVENTH CLAIM FOR RELIEF

STATE LAW CLAIM III

(VIOLATIONS OF THE UNFAIR COMPETITION ACT, CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200 ET SEQ.)

155. Plaintiffs repeat and realleges each and every allegation contained in paragraphs 1-154 above with the same force and effect as if here set forth in full.

156. The aforesaid agreements, combinations, and conspiracies in unreasonable restraint of trade and commerance and said violations of federal and state law are violations of California Business and Professions Code section 17200 et seq., commonly known as the Unfair Competition Act.

PRAYER FOR RELIEF

Wherefore, plaintiffs pray for judgment as follows:

157. The court adjudge and decree that defendants and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), California Business and Professions Code section 16700 et seq., California Insurance Code section 790 et seq., and California Business and Professions Code section 17200 et seq.

158. Defendants, their officers, directors, employees, agents, successors, assigns, subsidiaries, members, and all other persons acting or claiming to act on their behalf, be enjoined from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combinations

and conspiracies hereinbefore alleged, and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

159. Defendant ISO and its member companies and their staffs be enjoined from communicating directly outside the formal auspices of ISO, or other authorized rating bureau under applicable state law, concerning (a) rates, (b) standard policy form language, (c) choice of policy forms, or (d) terms and conditions of insurance, for any line, class or risk.

160. Defendant ISO and its directors, officers, employees, agents, and any other persons purporting to act on its behalf be enjoined from holding any meeting at the same time and location, or in coordination with, the meeting of any other trade association or group in the insurance industry.

161. Defendant ISO be enjoined to maintain accurate records of all attendees at every meeting of its Board, Executive Committee, or other committee or subcommittee meetings convened under the auspices of ISO, and to tape record each such meeting, including meetings held by conference call, and to maintain such tape(s) for a period of at least five years after the date(s) of such meetings, and make such tapes available, upon written request, to the Antitrust Section of the Attorney General of plaintiff State of California.

162. Defendant ISO be enjoined to maintain true and correct copies of all speeches, press releases, official publications, and other public statements by an officer, director, employee, agent, or other person acting on behalf of ISO, or acting in a capacity reasonably likely to be taken to be on behalf of ISO.

163. Defendant ISO be enjoined to issue forms or form coverage parts which include all of the elements of the original March 1984 CGL forms, as thereafter lawfully amended to include the following terms:

a. an automatic 60 day "mini-tail" for reporting claims:

b. Limitations upon an insurer's total freedom to advance the policy's retroactive date;

c. an automatic five year tail for occurrences notified to insurer but not yet claimed;

d. an advisory endorsement to reinstate a policy's aggregate limits if any unlimited reporting "tail" is separately purchased;

e. a requirement that the insurer notify the insured of his right to purchase an unlimited reporting "tail" whenever the retroactive date of the policy is advanced;

f. Limitations on the amount of detail required in the notice from the insured to the insurer which is required to activate the automatic 5-year "tail".

164. Enjoin defendant ISO to maintain statistical and rating support for the 1973 CGL form and for the 1984 CGL form as provided in the preceding paragraph.

165. Enjoin defendant ISO to provide any and all data maintained by ISO or received by ISO to any person, firm, public agency, or other entity requesting such data, conditioned only on payment of a reasonable, cost-based fee.

166. Enjoin each and every defendant insurer and reinsurer specified in paragraphs 1-110 from participating on any board or committee of ISO for five years.

167. Enjoin each and every defendant insurer and reinsurer specified in paragraphs 1-110 from making any

public announcements urging, recommending, or announcing product restrictions, pricing behavior, or changes in loss reserves.

168. Enjoin defendant ISO to maintain on its Board of Directors public-interest members as appointed by the Court, which public-interest members shall constitute a majority of the Board of Directors, and who shall be provided adequate compensation and support to participate effectively in the business of the Board of Directors.

169. Order that defendant ISO be restructured in such manner as the Court determines is necessary to prevent further anticompetitive conduct.

170. Enjoin each defendant reinsurer and each member company of the defendant RAA from communicating directly or indirectly with any other reinsurer, save in a public announcement made in the legitimate press/media, that it is considering withdrawing or forebearing from reinsuring any primary insurer, or any line of insurance.

171. Enjoin each defendant reinsurer, defendant RAA, and its member companies from establishing any formal or informal committees or other groups of competing reinsurers, or from communicating among themselves, for purposes that include or contemplate any activity regarding any forms, coverage parts, rates, terms or conditions upon which primary insurers or reinsurers provide coverage for CGL risks.

172. Enjoin each and every defendant reinsurer specified in paragraphs 1-110, and all members of the RAA, from communicating directly or indirectly outside a formal meeting of the RAA, or other legitimate trade organization, concerning rates, pricing, forms or other terms of insurance or reinsurance.

173. Enjoin defendant RAA to maintain accurate records of all attendees at every meeting of every Board, Executive Committee, or other committee or subcommittee

convened under the auspices of RAA and to tape record each such meeting, including meetings held by conference call, and maintain all such tape(s) for a period of not less than five years after the date(s) of such meetings, and make such tapes available, upon written request, to the Antitrust Division of the Attorney General of plaintiff State of California.

174. Enjoin each defendant Lloyd's of London Underwriter and London Company Market Underwriter and each member of the RAA to withdraw, in writing, any requirement it has imposed on any primary insurer that it exclusively implement claims-made forms for any of its CGL lines of business or which declare or create a boycott of any line or class of insurance, or any coverage part, and to submit copies of all such withdrawals to the court and the Attorney General of the plaintiff State of California.

175. Enjoin defendant General Re from participating in any Board or committee of the RAA for five years.

176. Enjoin defendants Thomas A. Greene and Co., R.K. Carvill Co., Ltd. and Ballantyne, McKean and Sullivan Ltd., from providing information to any reinsurer on the prices, terms, or conditions being imposed by any other reinsurer except as may be necessary in the course of negotiating a specific reinsurance contract on behalf of a specific, bona fide purchaser of reinsurance.

177. Enjoin each and every defendant engaged in the sale of insurance to consumers to divest itself of any and all reinsurance and brokerage affiliates, subsidiaries, or other operations, and enjoin said defendant from engaging in such operations in the future without leave of court.

178. Enjoin each and every defendant operating as an admitted carrier in plaintiff State of California to divest itself of any and all surplus lines and nonadmitted affiliates, subsidiaries, or other operations, and enjoin said

defendant from engaging in such operations in the future without leave of court.

179. Enjoin each and every defendant operating as a reinsurer to divest itself of any and all intermediary brokerage affiliates, subsidiaries, or other operations and enjoin said defendant from engaging in such operations in the future without leave of court.

180. Enjoin each and every defendant insurer and reinsurer from conditioning insurance or reinsurance on the insured's support for any action by any governmental entity or trade association.

181. Enjoin all defendants to develop individual antitrust compliance programs, and manuals detailing same, to be approved by the court and to report on an annual basis for 10 years to the court and plaintiff's counsel with regard to compliance efforts pursuant thereto.

182. Enjoin each and every defendant to establish and maintain a fund for the benefit of plaintiffs who have incurred injury for claims for which said plaintiffs would have had CGL coverage but for defendants' violations of law.

183. Plaintiffs be awarded three times the damages incurred by them as a consequence of the aforesaid conspiracies and combinations, as determined by the Court.

184. That each defendant be ordered to pay plaintiff civil penalties in an amount to be determined by the court, in accordance with California Business and Professions Code section 17206.

185. Plaintiffs have such other and further relief as the nature of the case may require and the court may deem just and proper.

186. Plaintiffs recover the costs of, and attorneys fees associated with, presenting this action.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, and Rule 200-4, Local Rules, United States District Court, Northern District of California, Plaintiffs demand trial by jury for all of the issues pled herein so triable.

DATED: March 22, 1988

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C88 2332

ANTITRUST JURY DEMAND

THE STATE OF CONNECTICUT, on behalf of itself and all municipalities, school districts, and other political subdivisions within the State, PLAINTIFF

v.

HARTFORD FIRE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, AETNA CASUALTY AND SURETY COMPANY, CIGNA CORPORATION, INSURANCE SERVICES OFFICE, INC., PETER N. MILLER, ROBIN A.G. JACKSON, MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREENE MANAGEMENT LIMITED, EDWARDS & PAYNE (Underwriting Agencies) LIMITED, C.J.W. (Underwriting Agencies) LIMITED, MURRAY LAWRENCE & PARTNERS, OXFORD SYNDICATE MANAGEMENT LIMITED, D.P. MANN UNDERWRITING AGENCY LIMITED, UNIONAMERICA INSURANCE CO., LTD., CNA RE (U.K.) LTD., TERRA NOVA INSURANCE CO., LTD., EXCESS INSURANCE COMPANY LIMITED, KEMPER RE (U.K.) LTD., CONTINENTAL REINSURANCE CO. (U.K.) LTD., THOMAS A. GREENE & CO., INC., BALLANTYNE, MCKEAN & SULLIVAN, LTD., R.K. CARVILL & CO., LTD., REINSURANCE ASSOCIATION OF AMERICA, GENERAL REINSURANCE CORPORATION, CONSTITUTION REINSURANCE CORPORATION, MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA, PRUDENTIAL REINSURANCE COMPANY, NORTH AMERICAN REINSURANCE CORPORATION, WINTERTHUR SWISS INSURANCE COMPANY, DEFENDANTS

COMPLAINT

[Filed June 14, 1988]

PRELIMINARY STATEMENT

The State of Connecticut, by its Attorney General, Joseph I. Lieberman, brings this action on its own behalf, as *parens patriae* on behalf of the general welfare and economy of the state, and on behalf of all municipalities, school districts and other political subdivisions which have been injured by defendants' violations of federal and state antitrust laws.

Defendants include major insurance and reinsurance firms and their trade associations. The defendants' illegal collusion resulted in severe restrictions in the availability and affordability of CGL property casualty insurance coverage for governmental entities and businesses.

The first claim for relief concerns all of the activities of the defendants herein. The remaining claims for relief, alternatively concern specific activities of particular defendants as hereinafter described. The second claim for relief concerns the manipulation of the standard policy forms relating to Commercial General Liability ("CGL") insurance coverage. These forms, produced by defendant Insurance Services Office, Inc. ("ISO"), dominate the markets for CGL, which is the general liability insurance purchased by most insurance consumers. Anti-consumer revisions were made in ISO's CGL forms as the result of boycotts, threats, intimidation and other coercive conduct by defendants. For example, insurance coverage for pollution was completely excluded from ISO's CGL policy forms. Additionally, insurance coverage for prior events was eliminated in ISO's new CGL "claims-made" insurance form. Defendants' conspiratorial and coercive conduct caused a severe market-wide constriction of CGL insurance coverage.

The third claim for relief alleges that defendant reinsurance companies and others conspired to boycott the "occurrence form" of ISO's CGL policy. Defendants allegedly did so in order to coerce insurers into offering the "claims made" form which provides consumers of insurance services far less actual insurance coverage. The fourth and fifth claims allege that domestic and foreign reinsurers boycotted and withheld reinsurance from the coverage of pollution risks. The sixth claim concerns the conspiracy between ISO and other defendants to standardize both "umbrella" and "excess" insurance forms. The seventh claim alleges corresponding violations of Connecticut state antitrust law as a result of all of the foregoing acts.

Plaintiff seeks declaratory relief, injunctive relief, civil penalties, and three times the damages sustained as a result of defendants' conspiracies in unreasonable restraint of trade.

I.

JURISDICTION AND VENUE

1. This complaint is filed and the jurisdiction of the court is invoked under the provisions of 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. §§ 15 and 26. Plaintiff seeks monetary, declaratory and injunctive relief for injuries caused by defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Claims arising under the Connecticut Anti-Trust Act, Conn. Gen. Stat. §§ 35-24, *et seq.* are also stated herein. This Court has pendent jurisdiction over such claims.

3. Venue is proper in this District under Sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391. Each of the defendants transacts business, has agents, resides or is found within the Northern District of California. Certain of the defendants are aliens, as alleged below.

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II.

DEFINITIONS

4. As used in the complaint, the following terms are defined as:

(a) "Claims-made form" means a CGL form under which the insurer is liable only for claims made during the policy period. It does not cover any claim that is received after the expiration date of the policy, even if the accident or event giving rise to the claim occurred during the effective dates of the policy. Prior to 1984, the claims-made form was not ordinarily used for CGL insurance.

(b) "Commercial general liability (CGL) insurance" means insurance coverage for third party damage (*i.e.*, "casualty") claims against a purchaser of insurance (the "insured"). Purchasers of CGL insurance include governmental entities, not-for-profit corporations and businesses. CGL insurance does not include coverage for damage to the property of an insured.

(c) "Defense within limits" (also referred to as "defense cost containment"; "defense cost within policy limits"; "defense cost cap") means a CGL policy provision which includes the insurer's defense costs as part of the stated policy limits. CGL insurance policies historically have included an obligation on the part of the insurer to pay the full legal costs of defending a claim without regard to policy limits.

(d) "Dual form availability" mean the availability of two standard CGL forms: an occurrence form and a claims-made form.

(e) "Insurance Services Office, Inc. (ISO)," is a not-for-profit corporation with offices throughout the country, including one in San Francisco, California. ISO is headquartered in New York, New York. It is a trade association for approximately 1,400 primary property casualty

insurance companies operating in the United States, including defendants Hartford, Allstate, Aetna and CIGNA. One of ISO's functions is to develop standard policy forms for use by insurance companies.

(f) "Layer" or "layer of coverage" means a portion of risk assumed by either a primary insurer or a reinsurer. Risks are layered to the extent that an insurer or reinsurer may be responsible only for claims above a certain amount but below another amount. For example, a reinsurer may agree to indemnify a primary insurer for claims paid by the latter in excess of $1 million but less that $2 million. The primary insurer may "retain" the first million dollars in exposure, while other reinsurers may cover higher risk exposure layers, such as those above the $2 million level.

(g) A "lead underwriter" is an underwriter recognized as having special expertise in certain classes and lines of risks. Ordinarily, he negotiates (with a primary insurer's broker, or intermediary) the terms, conditions and price of a reinsurance treaty which his syndicate or company will cover. The lead underwriter then is the first to sign the treaty. Thereafter, a broker arranges for other ("following") syndicates or companies to join the treaty on the same terms and conditions as those negotiated by the lead underwriter. Accordingly, lead underwriters have an influence on the reinsurance market far beyond the percentage of the risks that they actually assume.

(h) "Lloyd's of London" (Lloyd's) is an insurance marketplace or exchange in London, England, where syndicates transact their business. Lloyd's syndicates compete for business both within the Lloyd's marketplace and in the world-wide insurance and reinsurance markets. A Lloyd's policy may be underwritten by dozens of individual syndicates, each sharing a portion of the risk. The Lloyd's market provides reinsurance, as well as direct coverage in certain other unregulated markets, in the

United States. Approximately half of Lloyd's casualty business involves North American risks. At Lloyd's, all reinsurance must be procured through a broker admitted to the floor at the Lloyd's market.

(i) "London Company Market" means a group of insurance firms which are located in London but are not a part of the Lloyd's marketplace. These firms provide insurance and reinsurance coverage often by following the lead of a Lloyd's syndicate.

(j) "1984 ISO CGL forms" means the two CGL forms (an occurrence form and a claims-made form) filed by ISO with state regulators beginning in March 1984.

(k) "1986 ISO CGL forms" means the two CGL forms filed by ISO with state regulators for use in 1986, which forms contained a complete pollution exclusion, and as to the claims-made form included a retroactive date.

(l) "1973 ISO CGL form" means the standard CGL occurrence form and coverage parts developed by ISO in 1973, as amended prior to 1984.

(m) "Occurrence form" means a liability insurance form that covers injuries or losses, whenever claimed, that occur during the policy period. The policy in force when the injury or loss occurs pays the claim, even if the claim is made after the policy has expired. Prior to 1984, occurrence coverage was the principal form used for CGL insurance.

(n) "Pollution exclusion" refers to the exclusion from the 1986 ISO CGL forms of all coverage for pollution claims, including claims alleging damage caused by "sudden and accidental" pollution. The 1986 ISO CGL forms eliminated all pollution coverage.

(o) "Primary insurer" means an insurance company that sells insurance directly to consumers, including governments and businesses.

(p) "Reinsurance" means insurance for insurers. Reinsurance is a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company, the primary (or "ceding") insurer, for a designated portion of the insurance risks underwritten by the primary insurer. Reinsurance protects the primary insurer from catastrophic losses, and is heavily relied upon by prudent primary insurers. It also allows the primary insurer to sell more insurance than its own financial capacity might otherwise permit. Thus, the availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers.

(q) "Retroactive date" (retro date) means a provision in a claims-made insurance contract which excludes coverage for accidents or events that occurred prior to the specified date.

(r) "Retrocessional reinsurance" means insurance for reinsurers.

(s) "Risk" means the hazard or type of potential accident for which the insured seeks insurance protection. The term is also used within the industry to describe the insured itself, such as a "commercial risk" or a "municipal risk."

(t) "Sunset clause" means a provision included in a reinsurance treaty which limits the reinsurer's liability to those claims tendered to it by the primary insurer prior to the designated "sunset date." Thus a five year sunset clause means that the primary insurer will have no reinsurance coverage for claims it presents to the reinsurer later than five years from the inception of the treaty. Use of a sunset clause deprives primary insurers of reinsurance for long tail exposures beyond the sunset date.

(u) A "syndicate" is a group of individual investors associated with Lloyd's. Syndicates are separately owned and capitalized, independently operated, competing firms. Syndicates can act both as insurers and reinsurers. Each syndicate utilizes the services of an active underwriter to make its underwriting decisions and conduct all other insurance related business.

(v) "Tail" means the length of time during which an insurance company expects to receive claims arising from a certain risk covered by the insurance policy. Claims arising from "slips and falls" present the insurer with "short tail" exposure since all such claims will generally be known within a short time after their occurrence. Claims arising from environmental hazards such as asbestos pollution present insurers with "long tail" exposure because claims may be filed many years after the occurrence giving rise to such claim.

(w) "Treaty" means a contract by which a primary insurer transfers to one or more reinsurers a portion of a specified category of risks which the primary insurer will assume (*i.e.*, obligate itself to cover) during the term of the treaty.

(x) "Underwriting" means assessing and assuming a risk, and calculating a premium to be charged for assuming that risk.

III.

PLAINTIFF

5. Plaintiff, State of Connecticut, is one of the sovereign states of the United States of America. By virtue of his authority as contained in Sections 35-32 and 35-44a of the Connecticut General Statutes, Joseph I. Lieberman, the Attorney General of the State of Connecticut, brings this action on behalf of the State of Connecticut and all of its municipalities, school districts and other political subdivisions for monetary and injunctive relief under the antitrust laws of the United States and the State of

Connecticut. The violations of federal and state law alleged herein have caused loss and damage, and threaten continued loss and damage, to the State, to the general welfare and economy of the State, and to the parties on whose behalf this action is brought.

IV.

DEFENDANTS

A. *Primary Insurers*

6. Hartford Fire Insurance Company ("Hartford") is a Connecticut corporation with its principal place of business in Hartford, Connecticut. It is licensed to sell, and did sell, CGL insurance in California and Connecticut. Hartford is made a defendant herein as to claims 1, 2, 6 and 7.

7. Allstate Insurance Company ("Allstate") is an Illinois corporation with its principal place of business in Northbrook, Illinois. It is licensed to sell, and did sell, CGL insurance in California and Connecticut. Allstate is made a defendant herein as to claims 1, 2, 6 and 7.

8. Aetna Casualty and Surety Company ("Aetna") is a Connecticut corporation with its principal place of business in Hartford, Connecticut. It is licensed to sell, and did sell, CGL insurance in California and Connecticut. Aetna is made a defendant herein as to claims 1, 2, 6 and 7.

9. CIGNA Corporation ("CIGNA") is a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania. CIGNA, or its subsidiaries, are licensed to sell, and did sell, CGL insurance in California and Connecticut. CIGNA is made a defendant herein as to claims 1, 2, 6 and 7.

B. *Trade Associations*

10. Insurance Services Office, Inc. ("ISO") is a Delaware non-profit corporation with its principal place of business in New York, New York. ISO operates throughout the United States and has an office in San Francisco, California. It is an authorized insurance rating service organization in California and Connecticut. ISO is made a defendant herein as to claims 1, 2, 6 and 7.

11. Reinsurance Association of America ("RAA") is a trade association of domestic reinsurers with its principal place of business in Washington, D.C. RAA is comprised of reinsurers who transact business in California and Connecticut, and lobbies on their behalf in California. RAA is made a defendant herein as to claims 1, 2 and 7.

C. *Domestic Reinsurers*

12. General Reinsurance Corporation ("General Re") is a Delaware corporation with its principal place of business in Stamford, Connecticut. It provides reinsurance for insurers and risks located in California and Connecticut. General Re is made a defendant herein as to claims 1, 2 and 7.

13. Constitution Reinsurance Corporation ("Constitution Re") is part of a wholly-owned subsidiary of Xerox Financial Services, a Delaware corporation. Its principal place of business is in New York, New York and it provides reinsurance for insurers and risks located in California and Connecticut. Constitution Re is made a defendant herein as to claims 1, 2 and 7.

14. Mercantile and General Reinsurance Company of America ("Mercantile and General Re") is a New York corporation with its principal place of business in Morristown, New Jersey. It provides reinsurance for insurers and risks located in California and Connecticut. Mercantile and General Re is made a defendant herein as to claims 1, 2 and 7.

15. Prudential Reinsurance Company ("Prudential Re") is a Delaware corporation with its principal place of business in Newark, New Jersey. It provides reinsurance for insurers and risks located in California and Connecticut. Prudential Re is made a defendant herein as to claims 1, 2 and 7.

16. North American Reinsurance Corporation ("North American Re") is a New York corporation with its principal place of business in New York, New York. It provides reinsurance for insurers and risks located in California and Connecticut. North American Re is made a defendant herein as to claims 1, 2 and 7.

17. Winterthur Swiss Insurance Company ("Winterthur Swiss") is a Swiss limited liability company with its principal office in Winterthur, Switzerland. It provides insurance and reinsurance for insurers and risks located in California and Connecticut. Winterthur Swiss is made a defendant herein as to claims 1, 2 and 7.

D. *Lloyd's of London Syndicates*

18. Robin A.G. Jackson was, at all times relevant herein, the underwriter for defendant Merrett Syndicate. As the agent for Merrett Syndicate, Robin A.G. Jackson provided insurance and reinsurance for insurers and risks located in California and Connecticut. Robin A.G. Jackson is made a defendant herein as to claims 1, 2, 3 and 7.

19. Merrett Underwriting Agency Management Limited ("Merrett Syndicate"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Merrett Syndicate provides insurance and reinsurance for insurers and risks located in California and Connecticut. Merrett Syndicate is made a defendant herein as to claims 1, 2, 3, 4, 5, 6 and 7.

20. Three Quays Underwriting Management Limited ("Three Quays"), is an unincorporated association of in-

dividuals with its principal place of business at Lloyd's. The chief underwriter for Three Quays is Richard Hazell. Three Quays provides insurance and reinsurance for insurers and risks located in California and Connecticut. Three Quays is made a defendant herein as to claims 1, 2, 3, 6 and 7.

21. Janson Greene Management Limited ("Janson Greene"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Janson Greene provides insurance and reinsurance for insurers and risks located in California and Connecticut. Janson Greene is made a defendant herein as to claims 1, 2, 3 and 7.

22. Edwards & Payne (Underwriting Agencies) Limited ("Edwards & Payne"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Edwards & Payne provides insurance and reinsurance for insurers and risks located in California and Connecticut. Edwards & Payne is made a defendant herein as to claims 1, 2, 3, 4, 5 and 7.

23. C.J.W. (Underwriting Agencies) Limited ("C.J.W.") is an unincorporated association of individuals with its principal place of business at Lloyd's. C.J.W. provides insurance and reinsurance for insurers and risks located in California and Connecticut. C.J.W., is made a defendant herein as to claims 1, 2, 4 and 7.

24. Murray Lawrence & Partners ("Murray Lawrence"), is an unincorporated association of individuals with its principal place of business at Lloyd's. Murray Lawrence provides insurance and reinsurance for insurers and risks located in California and Connecticut. Murray Lawrence is made a defendant herein as to claims 1, 4 and 7.

25. Oxford Syndicate Management Limited ("Oxford") is an unincorporated association of individuals with its principal place of business at Lloyd's. Oxford provides

insurance and reinsurance for insurers and risks located in California and Connecticut. Oxford is made a defendant herein as to claims 1, 4, 5 and 7.

26. D.P. Mann Underwriting Agency Limited ("D.P. Mann"), is an unincorporated association of individuals with its principal place of business at Lloyd's. D.P. Mann provides insurance and reinsurance for insurers and risks located in California and Connecticut. D.P. Mann is made a defendant herein as to claims 1, 4 and 7.

27. Peter N. Miller was Chairman of Lloyd's during the period covered by this complaint. Miller is made a defendant herein as to claims 1, 3 and 7.

E. *London Company Market Reinsurers*

28. Unionamerica Insurance Co., Ltd. ("Unionamerica"), is a limited liability company with its principal place of business in London. Unionamerica provides insurance and reinsurance for insurers and risks located in California and Connecticut. Unionamerica is made a defendant herein as to claims 1, 4, 5 and 7.

29. CNA Re (U.K.), Ltd. ("CNA Re"), is a limited liability company with its principal place of business in London. CNA Re provides insurance and reinsurance for insurers and risks located in California and Connecticut. CNA Re is made a defendant herein as to claims 1, 4 and 7.

30. Terra Nova Insurance Co., Ltd. ("Terra Nova"), is a limited liability company with its principal place of business in London. Terra Nova provides insurance and reinsurance for insurers and risks located in California and Connecticut. Terra Nova is made a defendant herein as to claims 1, 4, 5 and 7.

31. Excess Insurance Company Limited ("Excess"), is a limited liability company with its principal place of business in London. Excess provides insurance and re-

insurance for insurers and risks located in California and Connecticut. Excess is made a defendant herein as to claims 1, 5 and 7.

32. Kemper Re (U.K.) Ltd. ("Kemper Re"), is a limited liability company with its principal place of business in London. Kemper Re provides insurance and reinsurance for insurers and risks located in California and Connecticut. Kemper Re is made a defendant herein as to claims 1, 5 and 7.

33. Continental Reinsurance Co. (U.K.), Ltd. ("Continental Re"), is a limited liability company with its principal place of business in London. Continental Re provides reinsurance for insurers and risks located in California and Connecticut. Continental Re is made a defendant herein as to claims 1, 5 and 7.

F. *Brokers*

34. Thomas A. Greene & Co., Inc. ("Thomas A. Greene"), is a New York corporation with its principal place of business in New York, New York, and offices in San Francisco, California. It acts as an intermediary broker for primary insurance companies doing business in California and Connecticut. Thomas A. Greene is made a defendant herein as to claims 1, 2 and 7.

35. Ballantyne, McKean & Sullivan, Ltd. ("Ballantyne McKean"), is a limited liability company with its principal place of business in London. It is an authorized Lloyd's broker which places insurance for insureds and reinsurance for primary insurance companies for risks located in California and Connecticut. Ballantyne McKean is made a defendant herein as to claims 1, 3, 4 and 7.

36. R.K. Carvill & Co. ("R.K. Carvill"), is a limited liability company with its principal place of business in London. It is an authorized Lloyd's broker which places reinsurance for primary insurance companies doing business in California and Connecticut. R.K. Carvill is made a defendant herein as to claims 1, 2 and 7.

V.

CO-CONSPIRATORS

37. Various persons, firms, corporations or other business entities, known and unknown to plaintiffs, are not made defendants herein but participated as co-conspirators with defendants in the violations alleged herein and performed acts and made statements in the furtherance thereof.

VI.

TRADE AND COMMERCE AFFECTED

38. The activities of the defendants and their co-conspirators, and the restraints which are the subject of this complaint, were and are within the flow of, and substantially affect, interstate commerce, as more particularly described below.

39. During the period covered by this complaint the defendant primary insurance companies sold CGL insurance throughout Connecticut and the United States. Their customers included, among others, corporations engaged in interstate commerce as well as state and local governmental entities. In 1986, CGL insurance premiums in the United States were $24.1 billion. Defendants Hartford, Allstate, Aetna, and CIGNA are providers of CGL insurance in Connecticut and throughout the United States.

40. Defendant reinsurance companies and syndicates provide reinsurance for CGL insurance and property insurance policies throughout Connecticut and the United States. Approximately one-half of Lloyd's business covers North American risks. Income from United States CGL reinsurance and property reinsurance premiums constitutes a substantial portion of all reinsurance premium income in both the United States and London.

41. During the period covered by this Complaint, the sale of CGL property/casualty insurance and reinsurance involved the following, among other things:

(a) Various channels of interstate communication, including telephone lines and the mails, were regularly used in the purchases of CGL property/casualty insurance and reinsurance and in the development of the ISO CGL insurance forms described in this complaint;

(b) A substantial amount of the CGL insurance that was purchased by plaintiff, and the parties upon whose behalf this action is brought, came from outside Connecticut;

(c) Insurance forms for the sale of CGL insurance were developed by defendant ISO and other defendants, which forms were filed or lodged with the insurance regulators of each State of the United States, including the State of Connecticut;

(d) A substantial quantity of CGL insurance was sold nationwide on forms developed by defendant ISO; and

(e) Each defendant insurance company purchases a substantial quantity of reinsurance from outside the State in which it is located.

42. The illegal conduct challenged herein has had, and may be expected to continue to have, a not insubstantial effect on the above-described interstate trade and commerce.

VII.

BACKGROUND: STATE REGULATION AND ISO

A. *State Regulation of Insurance*

43. All fifty states regulate some aspects of the business of insurance. The extent of the regulation varies widely from state to state and depends on the type of insurance.

44. Pursuant to state law, only "admitted," or licensed, insurers such as defendants Hartford, CIGNA, Aetna and Allstate are permitted to write CGL insurance, with one exception. That exception is for "surplus" or "excess" lines. Surplus or excess lines are unusual lines of insurance for which coverage is nominally unavailable in the admitted market. For those lines, after the unavailability has been certified, the policy may be written by a non-admitted company known as a surplus or excess lines insurer. These surplus or excess lines are not regulated by the states.

45. Umbrella and excess coverage provides insurance consumers with higher levels of protection above other liability insurance they may purchase. Umbrella and excess insurance can be written by either admitted or non-admitted insurance companies. States also do not regulate umbrella and excess coverage offered by non-admitted insurance companies.

46. Reinsurance transactions are not subject to state insurance regulation.

B. *ISO and the Market Dominance of ISO Forms*

47. The Insurance Services Office ("ISO") is a trade association consisting of approximately 1400 property/casualty insurers including defendants Hartford, Allstate, CIGNA, and Aetna. ISO was created in 1971 as a result of the merger of eleven regional and national property and casualty rating bureaus. The member companies of ISO write approximately 95% of all casualty insurance written in the United States. These defendants have at all relevant times authorized ISO to file CGL policy forms with the Connecticut Insurance Commissioner.

48. ISO performs a variety of tasks for its member companies. Among other functions, it develops standard policy forms, collects historical loss and other data, projects future loss trends based on that data, and calculates

advisory premium rates and rules for CGL and certain other lines of insurance.

49. ISO is headed by a Board of Directors and an Executive Committee which reports to the Board. Policy forms are developed by insurance company representatives sitting on standing committees such as the "Commercial Lines Committee." Defendants Hartford, Allstate, CIGNA and Aetna all played leadership roles in the development of ISO CGL forms.

50. CGL insurance written by primary insurers in the United States, including that written by defendants Hartford, Allstate, CIGNA and Aetna is predominately written on the ISO standard policy forms and coverage parts.

51. The dominance of the ISO CGL forms results from the monopoly position it has occupied since the 1971 merger referred to above. One of ISO's key functions is its actuarial operations of maintaining a national statistical data base which records the actual performance ("loss history") of its policy forms in the marketplace.

52. For example, with respect to the 1973 ISO CGL form, ISO collected, aggregated and interpreted data on the premiums charged, claims filed and paid, defense costs expended and many other categories of information which show precisely how this insurance product performed.

53. Applicable law in Connecticut, and other states, permits ISO to act as a rating organization for its member companies. ISO projects future loss trends based on the data it has collected, and then calculates advisory rates for CGL and other lines of insurance.

54. Non-admitted companies in the surplus lines market often use ISO CGL forms, or parts thereof, to underwrite risks, including those of the plaintiff and the parties on whose behalf this action was brought.

VIII.

FACTS

A. *The 1973 ISO Occurrence Form*

55. The conspiracies alleged herein occurred after ISO undertook to revise its standard CGL insurance form that had been in use since 1973.

56. The 1973 ISO form employed the traditional "occurrence" trigger of coverage that had long been used for CGL insurance. The standard occurrence policy language obligated the insurance company to pay or defend claims, whenever made, resulting from an accident or "injurious exposure to conditions" that occurred during the period the policy was in effect.

57. The 1973 ISO form covered claims relating to "sudden and accidental" pollution.

58. Another key provision of the 1973 ISO CGL form was that legal costs of defending claims were borne by the insurance company rather than the insured. A 1973 CGL policy for $1,000,000 worth of insurance coverage would provide fully that much protection for the insured, and would not be reduced by the cost of defending against the claim.

59. In 1977 ISO began a project to substantially revise the 1973 occurrence form. This process resulted in a new set of CGL forms filed or lodged with state insurance regulators in March 1984.

B. *The 1984 ISO Forms*

60. The 1984 ISO CGL forms differed from the 1973 ISO CGL form in one key respect relevant to this complaint: for the first time ISO filed two alternative CGL forms, one with a traditional "occurrence" trigger of coverage and a second with a new "claims-made" trigger.

61. The "claims-made" concept was a major change in the way CGL insurance had always been written. The trigger of coverage for the occurrence form focused on

when the accident or event itself occurred and it did not matter when the notice of the claim actually reached the insurance company. The trigger of coverage for the "claims-made" policy, on the other hand, was the receipt of the claim by the insurer. If the claim came in during the period the policy was in effect, it was covered. If the claim was filed after the policy had expired, it was not covered. Coverage for these future claims is entirely dependent upon the insured's ability to purchase claims-made CGL insurance in succeeding years.

62. The claims-made form provides much less protection against long tail losses than an "occurrence" form. It shifts the risk of uncertainty for claims filed in the future from the insurer to the insured. Claims-made policies can be used by insurers to cut off liability to claims reported in the future by refusing insurance renewals to insured who experience any increased or unexpected trend in claims.

63. As originally filed by ISO, the 1984 claims-made CGL form did not include a "retroactive date" provision. Inclusion of a "retroactive date" provision has the effect of cutting off all coverage for occurrences prior to the retroactive date. Without a retroactive date an injury in 1983 that was not filed with the insurance company until 1984 would be covered by the 1984 claims-made policy.

64. Other key aspects of the two 1984 ISO forms, however, were identical to the 1973 CGL form. Most important, both new forms continued to cover damage caused by "sudden and accidental" pollution. In addition, legal defense costs would continue to be borne by the insurance company without regard to the policy limit.

65. Within ISO, defendant Hartford opposed the proposed CGL forms on the grounds that: (a) the occurrence form should have been eliminated entirely in favor of issuing solely a claims-made form; (b) the claims-made form should have included a standard retroactive

date provision; (c) pollution coverage should have been totally excluded by elimination of the coverage for "sudden and accidental" pollution coverage; and (d) defense costs payable under the policy by the insurer should have been limited by including defense costs within the policy limits. Defendant Allstate opposed the claims-made form because it contained no standard retroactive date provision.

66. The majority of ISO Executive and Commercial Lines Committee members, however, supported the proposed CGL forms and rejected the changes proposed by defendants Hartford and Allstate. On December 15, 1983 the new CGL forms were approved by the ISO Board of Directors. ISO filed or lodged the two new CGL forms with state regulators beginning in March 1984.

C. *RAA's Response to the 1984 Forms*

67. After their positions were rejected by a majority of ISO, certain primary insurance companies, including defendants Hartford, CIGNA, Aetna and Allstate, exerted concerted pressure on ISO staff and other ISO Company members in an effort designed to have the CGL forms withdrawn and to restrict CGL coverage available to the consumer under any new CGL forms.

68. On March 2, 1984 representatives of Hartford met with representatives of General Re, the largest American reinsurer. The purpose of the meeting was to formulate a joint strategy to force changes in the 1984 ISO CGL forms. At this meeting, Hartford and General Re agreed to either coerce ISO to adopt their demands or, failing that, to "derail" the entire ISO CGL forms program.

69. At an RAA Executive Committee meeting held March 13, 1984, in furtherance of its agreement with Hartford, General Re initiated a coordinated effort with the RAA to force revisions in the ISO CLG forms program. On April 18, 1984, RAA and certain of its mem-

bers were informed by ISO staff that changes in the 1984 ISO CGL form would not be made. In response, on May 26, 1984 the RAA Executive Committee created a "CGL Committee" consisting of defendants General Re, Mercantile & General Re, Constitution Re, North American Re and Winterthur Swiss.

70. At a June 15, 1984 meeting of the RAA CGL Committee, its members agreed to boycott the 1984 ISO CGL forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both forms.

71. In a letter to ISO dated June 19, 1984, RAA announced that its members would not provide reinsurance for coverages written on the 1984 ISO CGL forms. Before it was sent, each of the members of the RAA CGL Committee approved the wording of the letter. Prudential Re approved the substance of the letter.

72. Defendants General Re and Hartford also enlisted Thomas A. Greene, President of defendant Thomas A. Greene & Co., Inc., to convey the boycott message to ISO in a widely-reported speech to the ISO Board of Directors on June 21, 1984. Greene stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL forms.

D. *Lloyd's Response*

73. Defendants Hartford, Allstate, CIGNA and Aetna also encouraged a boycott of the 1984 ISO CGL forms by key Lloyd's syndicates, including the lead underwriters for North American casualty reinsurance. As with the RAA conspiracy, the common goal of the London reinsurers, as well as the primary insurer defendants, was to coerce ISO and its members to withdraw the 1984 ISO CGL forms and issue a more restrictive CGL form. These anti-consumer restrictions would include an end to all coverage for pollution liability and the addition of a retroactive date on a new claims-made form.

74. Defendants Hartford, Allstate, CIGNA, Aetna and others communicated to several lead Lloyd's syndicates, including defendants Merrett Syndicate, Edwards & Payne, and Three Quays, their desire to restrict the ISO CGL coverage.

75. As early as April 23, 1984 ISO learned that defendant Robin Jackson of Merrett Syndicate, a highly influential lead underwriter in the North American casualty reinsurance market, was threatening to withhold reinsurance from the market for primary companies using the new ISO forms.

76. In late May 1984, ISO, in recognition of Lloyd's power as a reinsurer of the United States CGL market, arranged a visit to London for July, 1984 to explain and promote the 1984 ISO CGL forms to the London market.

77. Prior to the July London meetings, Hartford and Allstate enlisted the aid of intermediary brokers Thomas A. Greene, and Nick Graham of R.K. Carvill to maximize the London reinsurance market's pressure on ISO to change its CGL forms.

78. While ISO staff were in London to discuss the March 1984 ISO CGL forms, London reinsurers threatened a boycott of North American CGL risks unless four key demands were met:

(a) The elimination of any ISO CGL occurrence form;

(b) The addition of a retroactive date to a new revised CGL claims-made form;

(c) The exclusion of any pollution liability coverage from any CGL form; and

(d) Defense costs within limits.

79. These demands were conveyed to ISO staff in meetings with individual syndicates and companies in the London market, and at a dinner at the Garrick Club hosted by ISO on July 4, 1984. In attendance at the

dinner were the leading Lloyd's underwriters of U.S. casualty reinsurance, including Robin A.G. Jackson of the Merrett Syndicate, Richard Hazell of Three Quays, Charles Skey of Edwards & Payne, and Gale Coles of Janson Greene. ISO staff reported that the dinner attendees were "almost militant" in their resolve to eliminate coverage of CGL risks on the occurrence form.

80. After returning from London, ISO staff met with defendant Hartford at its headquarters in Connecticut. By this time threat of a reinsurance boycott unless key changes were made in the 1984 ISO CGL forms was known within ISO as "the Hartford problem." Defendant Hartford continued to insist upon the coverage restrictions previously described.

81. Sometime between August 12 and August 22, 1984, ISO staff, in a reversal of its own previous position on these matters, agreed to recommend that key provisions of the 1984 CGL forms be reconsidered and revised as demanded. On August 23, 1984, under pressure from defendants, the Commercial Lines Committee of ISO capitulated and reversed its positions on the retroactive date and pollution exclusion. Later that same day, the ISO Executive Committee decided that a final decision on these revisions to the forms should await their next meeting on September 20, 1984.

E. *The September 20, 1984 Agreement*

82. As demanded on August 23, 1984 by defendants Hartford and Aetna, ISO invited representatives of both the foreign and domestic casualty reinsurance markets to the September 20, 1984 Executive Committee meeting. Never before had representatives of the domestic or foreign reinsurance markets been invited to speak at an ISO Executive Committee meeting.

83. Eight representatives of what were major sources of reinsurance for all of ISO's member companies were

invited to attend both the September 20 meeting and a dinner with the Committee to be hosted by ISO the evening before. These representatives were:

(a) Ronald Ferguson and John Etling, Chairman and President, respectively, of General Re;

(b) N. David Thompson, President of North American Re;

(c) George Nimmo, President of Prudential Re and the Chairman of the RAA at the time;

(d) Andre Maisonpierre, President of RAA;

(e) Robin Jackson of the Merrett Syndicate;

(f) Richard Hazell of Three Quays; and

(g) Gale Coles of Janson Greene. ISO staff also contacted six other Lloyd's reinsurers and encouraged them to convey their views on the scheduled issues to Jackson, Hazell and Coles.

84. During the evening of September 19, 1984 Ferguson and Etling of General Re, Thompson of North American Re, Nimmo of Prudential Re and Chairman of the RAA, Maisonpierre, the RAA president, and ISO officers dined at the Board Room, a private club in New York City. At this dinner the reinsurers communicated to ISO Board Members present their agreed positions on the CGL revision issues set for an ISO Executive Committee vote the next day.

85. Of the eight reinsurer representatives invited by ISO, only Hazell and Coles could not attend the September 20 meeting. With advance knowledge of this fact in mind, ISO had urged Hazell and Coles to convey their views to Jackson before the meeting. Jackson conferred with at least Hazell and Coles before attending the meeting at ISO's headquarters in New York.

86. At the ISO Executive Committee meeting of September 20, 1984 the foreign and domestic reinsurer repre-

sentatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance.

87. As of September 20, 1984 ISO members were already aware of emerging capacity problems in the CGL reinsurance markets and the difficulties they would face in the renewal of their casualty treaties for 1985. A reinsurance boycott at that time would have been devastating for ISO members.

88. After the reinsurance representatives spoke, the ISO Executive Committee voted to include a retroactive date in the claims-made form, to exclude all pollution coverage from both new forms, and to defer to a later date the revision of the forms on the defense cost containment issue. ISO did not change its existing plan to offer a new occurrence form along with the new claims-made form. The 1984 ISO CGL forms were thereafter withdrawn from the marketplace and replaced with new substitute CGL forms which include the coverage restrictions insisted upon by the defendant reinsurers and insurance companies. The final version of the revised forms were filed or lodged with state regulators in 1986.

89. In furtherance of the agreements reached on September 20, 1984, defendants ISO, Hartford, Aetna, and a "London reinsurer" combined to form an "ISO Team" to market the new forms. This scheme included coordinated speeches before groups of insurance brokers and agents to convince them that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the ISO forms were not approved. The scheme also included plans to effect their agreement to add a defense within limits provision to the CGL forms.

F. *The Occurrence Form Boycott*

90. Even after their success at the ISO Executive Committee meeting on September 20, 1984, defendant Peter N. Miller, defendant Lloyd's reinsurers, including

Robin A.G. Jackson of the defendant Merrett Syndicate and Richard Hazell of defendant Three Quays, defendants Jason Green, Edwards & Payne, Ballantyne McKean and their co-conspirators, continued their attempt to eliminate the occurrence form as an option for most risks and to make the restrictive claims-made form the standard CGL policy form.

91. As a means of coercing the insurance market to accept the claims-made form, Lloyd's reinsurers employed two primary strategies:

(a) Public and private pronouncements that there would be no reinsurance for primary insurers writing on the occurrence form; and

(b) The redesign of reinsurance treaties to eliminate coverage for "long tail" risks, thereby leaving the primary insurer without reinsurance protection for claims reported in the future. This exclusion became known as the "sunset clause".

92. In furtherance of the first strategy, Lloyd's reinsurers, including lead underwriters Robin Jackson and Richard Hazell, collectively refused to write new treaties for, or to renew long-standing treaties with, primary U.S. insurers unless they were prepared to switch from the occurrence to the claims-made form. Primary insurers who did not evidence a strong intention to commit to claims-made would be left either without reinsurance coverage or with very low limits of coverage, even though the claims-made form itself had not yet been approved for use in many jurisdictions.

93. Representatives of Lloyd's including defendant Peter N. Miller, then, and at all relevant times, the Chairman of Lloyd's, also appeared in various public forums and in the trade press to present their agreed upon position that Lloyd's was withdrawing entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form. In furtherance of this

effort, Robin Jackson circulated a series of letters to brokers, clients and fellow reinsurance syndicates pressing for further changes in the ISO forms, including the elimination of the option of an occurrence form for any CGL risk.

94. A second stratagem employed by Lloyd's reinsurers, including defendants, was to impose a "sunset clause" restriction within their treaties with U.S. primary insurance companies that effectively eliminated reinsurance coverage for "long tail" risks written on the occurrence form.

95. After the so-called "sunset date", reinsurance coverage expires and the U.S. primary insurer becomes fully answerable for all losses without the benefit of reinsurance indemnity. The "sunset clause" was intended to force primary insurers to stop writing occurrence coverage, and to substitute claims-made coverage, for all risks except very small risks.

96. During 1985 and early 1986, London reinsurers, acting in conjunction with intermediary brokers, including defendant Ballantyne McKean, combined to impose sunset clauses in reinsurance treaties for U.S. primary casualty insurance written on an occurrence form basis.

G. *The Pollution Liability Coverage Boycott*

97. In addition to the boycott of the occurrence form in general, by no later than January 1, 1986, reinsurers in London also boycotted reinsurance for pollution liability coverage in particular, even if written on a claims-made form. This conspiracy had the effect of drastically restricting the availability and affordability of pollution liability coverage in the United States, including Connecticut.

98. The boycott was accomplished by joint agreement between lead Lloyd's of London underwriters and leading reinsurance firms in the London company market to exclude all pollution liability coverage from "casualty" reinsurance treaties, beginning at least by late 1985 and continuing to the present. Participating Lloyd's syndicates included the defendants Merrett Syndicate, Three Quays, Edwards & Payne, C.J.W., Murray Lawrence, Oxford, and D.P. Mann. Participating London company market defendants included Unionamerica, CNA Re and Terra Nova.

99. On November 6, 1985, at a meeting of these lead underwriters at the offices of defendant Ballantyne McKean, those present agreed that all North American casualty reinsurance treaties, including coverage for CGL, would be written with a total pollution exclusion.

100. The complete exclusion of pollution coverage from casualty reinsurance treaties had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers that had potential pollution liability exposures, such as municipalities, could not find primary insurers willing to provide "sudden and accidental" coverage for such consumers.

H. *ISO's Withdrawal Of Support For The 1973 CGL Forms*

101. As a result of the boycott, coercion and intimidation described herein, ISO succeeded in obtaining regulatory approval in most states where such approval is needed for its revised CGL forms, both a new revised occurrence form and the revised claims-made form.

102. In Connecticut, the 1986 ISO CGL forms were originally filed with the Connecticut Insurance Commissioner on December 5, 1984, and affirmatively approved by said Commissioner for use in Connecticut in February, 1986.

103. On July 1, 1987, ISO officially withdrew its "support" of the 1973 CGL form. "Support" in this context

includes the normal data collection and actuarial services performed by ISO in aid of its member companies. Without such support, most ISO members could not continue to use the 1973 occurrence form, because it is very difficult and expensive for any single company to duplicate the critical ISO support functions.

104. Although many insurance consumers preferred the 1973 CGL forms, the market for this type of coverage has all but disappeared.

I. *ISO's Standardized CGL Insurance Policy For The Excess And Umbrella Markets*

105. Beginning no later than November 10, 1985, ISO staff and ISO members, including defendants Hartford and Aetna agreed that ISO staff should begin developing standardized CGL umbrella and excess policy language. CIGNA later joined this effort. This decision was made despite the fact that ISO, as the trade association for admitted property/casualty primary insurance companies, plays no authorized role in the unregulated excess and umbrella markets. "Excess" insurance is a specialized form of insurance normally not offered by admitted insurers on a regulated basis. "Excess" also refers to a layer of insurance, a higher level of indemnity protection, that sits on top of a self-insurance program, often referred to as a "retention", or a primary insurance policy. "Umbrella" coverage is similar to excess insurance and likewise is not normally offered on a regulated basis.

106. After the introduction of the new versions of the ISO CGL forms, ISO had begun to receive pressure from domestic reinsurers, London reinsurers, and others to develop standardized policy language for CGL excess and umbrella forms which would conform to the revised ISO CGL forms.

107. On January 14, 1986, the ISO Board of Directors approved a recommendation that the ISO staff develop

standardized excess and umbrella policy forms for broad distribution.

108. Early drafts of the standardized policy language were written by defendant Allstate, ISO staff members and others. Comments were solicited and received from defendants Merrett Syndicate, Three Quays and others in the reinsurance and umbrella and excess insurance markets.

109. On June 15, 1986 the ISO Executive Committee released standardized Model CGL excess and umbrella policy language, coverage parts and endorsements with the following provisions, among others:

(a) A retroactive date in the claims-made version;

(b) An absolute pollution exclusion in both versions; and

(c) Defense costs within the policy limits for both versions.

J. *The Pollution Property Coverage Boycott*

110. Specialized reinsurers in London and the United States have also agreed to boycott reinsurance and insurance policies for U.S. and Canadian property seepage and pollution exposures. These companies include Unionamerica, Terra Nova, Excess, Edwards & Payne, Kemper Re, Merrett Syndicate, Continental Re, and other unnamed co-conspirators. This conspiracy has had the effect of drastically restricting the availability and affordability of property pollution coverage in the United States, specifically including Connecticut.

111. The agreement to boycott the provision of property pollution insurance and reinsurance for North American exposures is memorialized in a document entitled "Non Marine London Market Agreement 1987" (hereinafter "Market Agreement"). This Market Agreement is

signed by over forty LMX Retrocessional reinsurers both at Lloyd's and in the London Company Market. "LMX" is the short hand for those retrocessional reinsurers who specialize in providing such reinsurance for the Lloyd's and London Company Market Companies.

112. The parties to the Market Agreement agreed to use their "best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January, 1987 will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable."

113. The Market Agreement to boycott property pollution coverage was subsequently agreed to by at least twenty-nine North American retrocessional reinsurers in the LMX market.

114. The agreed upon exclusion of seepage and pollution risks from property insurance and reinsurance policies has had a direct impact on U.S. primary insurers and insurance buyers. Insurance consumers who sought coverage for property exposures were no longer able to find primary insurers willing to provide such coverage.

FIRST CLAIM FOR RELIEF

CONSPIRACY AMONG ALL DEFENDANTS

115. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

116. Beginning on a date unknown to plaintiff, but at least as early as on or about March 1984, and continuing thereafter, the defendants and their co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for CGL property/casualty risks and for reinsurance and retrocessional reinsurance in connection therewith in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

117. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and their co-conspirators, for the purpose and with the effect of shrinking the scope of CGL property/casualty insurance and reinsurance and retrocessional reinsurance in connection therewith in order to simultaneously reduce financial exposure to such risks and to increase underwriting profits therefrom. The substantial terms of the aforesaid agreement were:

(a) To substantially limit, if not eliminate, long tail risks from insurance, reinsurance and retrocessional reinsurance coverage;

(b) To eliminate the availability of CGL occurrence insurance, with its potential for long tail risks;

(c) To eliminate pollution coverage;

(d) To eliminate retroactive liability;

(e) To limit the risk for defendants of the high cost of defending liability claims against insureds;

(f) To conform CGL coverage, including ISO CGL forms, to the above limitations; and

(g) To conform excess and umbrella coverage to the above limitations.

118. In order to carry out the foregoing contract, combination or conspiracy, the defendants and their co-conspirators have done those things which they have combined or conspired to do, including, but not limited to:

(a) The use of boycott, coercion and intimidation in order to limit CGL coverage as aforesaid; and

(b) Meeting at various times, places and in different combinations for the purpose of developing and implementing a joint strategy to force the changes and limitations as aforesaid.

119. The aforesaid contract, combination or conspiracy, has had the following effects, among others:

(a) Competition in the insurance, reinsurance and retrocessional reinsurance markets for CGL coverage has been unreasonably restrained;

(b) Competition in the excess and umbrella insurance market has been unreasonably restrained;

(c) The availability of CGL property/casualty insurance for pollution risks has been substantially restricted;

(d) The availability of retroactive CGL coverage has been substantially restricted;

(e) The availability of insurance which will pay both the cost of defending liability claims in full and the policy limits for liability losses is being phased out;

(f) The extent of available CGL coverage has been substantially restricted;

(g) The price for CGL property/casualty coverage has been artificially increased; and

(h) The price of long tail risk coverage for CGL liability insurance has been artificially increased.

SECOND CLAIM FOR RELIEF

CONSPIRACY TO MANIPULATE
ISO CGL FORMS

120. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above, with the same force and effect as if here set forth in full.

121. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Hartford, Allstate, Aetna, CIGNA, ISO, Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, C. J. W., Thomas A. Greene, R. K. Carvill, RAA, General Re, Constitution Re, Mercantile & General Re, Prudential Re, North American Re, Winterthur Swiss and other co-

conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary insurance coverage of CGL risks.

122. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which reinsurance coverage would be provided for CGL risks; and

(b) To refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms to incorporate defendants' terms.

123. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 121 and co-conspirators did those things which they combined or conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree on the terms under which they would reinsure CGL risks;

(b) Agreeing to boycott the 1984 ISO CGL forms, unless they were amended to comply with defendants' terms;

(c) Coercing and intimidating ISO and ISO members to adopt the coverage terms and exclusions agreed upon by defendants;

(d) Agreeing to incorporate the retroactive date coverage term and pollution liability exclusion language in the 1986 ISO CGL forms; and

(e) Agreeing to revise further the ISO CGL forms to provide for defense costs within policy limits, but agreeing to delay such revision until the changes in the retroactive date and pollution exclusion terms were introduced

to the market and approved by insurance regulators, where necessary.

124. This contract, combination or conspiracy has had the following effects, among others:

(a) The standard ISO CGL policy available in the State of Connecticut excludes all pollution liability coverage;

(b) The standard CGL claims-made policy available in the State of Connecticut excludes retroactive coverage;

(c) The price of pollution liability coverage and retroactive claims-made coverage, where it is available, has been increased;

(d) Competition in the market for pollution liability coverage and retroactive claims-made coverage has been unreasonably restrained; and

(e) Defense within policy limits is, or will be, a standard provision of CGL policies.

THIRD CLAIM FOR RELIEF

THE OCCURRENCE BOYCOTT: CONSPIRACY OF LLOYD'S REINSURERS TO COERCE PRIMARY INSURERS TO OFFER COVERAGE ONLY ON A CLAIMS-MADE BASIS

125. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

126. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Peter N. Miller, Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, Ballantyne McKean and other co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for reinsurance coverage of CGL risks and the market for primary coverage of CGL risks.

127. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which reinsurance coverage would be provided for CGL risks;

(b) To refuse to reinsure those CGL risks written on an occurrence form; and

(c) To eliminate reinsurance coverage for "long-tail" risks covered by occurrence policies.

128. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 126 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) Conducting meetings and discussions among themselves to agree on the terms under which reinsurance would be made available for North American CGL risks;

(b) Agreeing to structure, promote and publicize a boycott of reinsurance for North American CGL risks by refusing to reinsure any other than those risks written on a claims-made CGL form, or by offering such reinsurance only when it was itself written on a claims-made basis;

(c) Coercing and intimidating primary insurers to use the claims-made form and reject the occurrence form; and

(d) Coercing and intimidating individuals who had spoken to, or had reason to so address, or might have commercial interest in speaking to, regulatory and or legislative bodies or officials concerning that body's or official's approval of the adoption or use of the claims made CGL form so as to influence or determine said individual's presentation to said officials or bodies.

129. The aforesaid contract, combination or conspiracy has had the following effects, among others:

(a) The market for occurrence CGL coverage available in the State of Connecticut was unreasonably restrained;

(b) Occurrence CGL coverage became unavailable, or limited in availability, in the State of Connecticut for many risks, including municipal general liability risks; and

(c) The price of occurrence liability coverage, where it is available, has been increased.

FOURTH CLAIM FOR RELIEF

CONSPIRACY OF LLOYD'S REINSURERS, BROKERS AND LONDON COMPANY MARKET REINSURERS TO BOYCOTT POLLUTION COVERAGE

130. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

131. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants, Merrett Syndicate, Murray Lawrence, Oxford, Edwards & Payne, D.P. Mann, C.J.W., Unionamerica, Terra Nova, CNA Re, and Ballantyne McKean, and other co-conspirators, have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for casualty reinsurance coverage for pollution risks and the market for primary casualty coverage of pollution risks.

132. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which casualty reinsurance coverage would be provided for CGL risks; and

(b) To limit the availability of pollution coverage in U.S. primary casualty insurance.

133. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 131 and co-conspirators did those things which they combined and conspired to do, including but not limited to the following:

(a) Conducting meetings and discussions among themselves to agree on the exclusive terms under which they would reinsure North American CGL risks; and

(b) Agreeing to exclude from all casualty treaty reinsurance written in London all pollution coverage for North American risks.

134. The aforesaid contract, combination or conspiracy has had the following effects, among others;

(a) Pollution liability coverage has become almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of Connecticut;

(b) The price paid by plaintiffs for pollution liability coverage, where it is available, has dramatically increased; and

(c) Competition in the market for pollution liability coverage has been unreasonably restrained.

FIFTH CLAIM FOR RELIEF

LLOYD'S, LONDON COMPANY MARKET AND DOMESTIC RETROCESSIONAL REINSURER BOYCOTT OF PROPERTY POLLUTION COVERAGES

135. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

136. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the defendants Unionamerica, Terra Nova, Excess, Edwards & Payne, Kemper Re, Merrett Syndicate, Oxford, Continental Re, and unnamed co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the market for property insurance coverages for seepage, pollution and contamination exposures situated in North America, including the State of Connecticut.

137. Such contract, combination or conspiracy consisted of a continuing agreement, understanding and concert of action among such defendants and their co-conspirators, the substantial terms of which were:

(a) To restrict the terms under which property insurance and reinsurance coverage would be provided for North American risks; and

(b) To limit the availability of property insurance and reinsurance for North American risks.

138. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in paragraph 136 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree to coverage terms and exclusions for primary and reinsurance coverages for North American property insurance; and

(b) Agreeing to boycott the provision of all retrocessional reinsurance for any U.S. or Canadian primary or reinsurance property coverages unless the original insurance coverage includes a seepage, pollution and contamination exclusion clause.

139. The aforesaid contract, combination or conspiracy has had the following effects, among others:

(a) Property insurance and reinsurance policies written for U.S. and Canadian property risks, including all such risks in the State of Connecticut, now exclude a seepage, pollution and contamination clause;

(b) The prices for seepage, pollution and contamination property insurance coverages, where they are still available, have been increased; and

(c) Competition in the market for property seepage, pollution and contamination coverages has been unreasonably restrained.

SIXTH CLAIM FOR RELIEF

CONSPIRACY BY ISO, REINSURERS AND INSURERS TO RESTRAIN TRADE IN THE COMMERCIAL UMBRELLA AND EXCESS INSURANCE MARKETS

140. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-114 above with the same force and effect as if here set forth in full.

141. In violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, defendants ISO, Allstate, Hartford, Aetna, CIGNA, Merrett Syndicate, and Three Quays, and unnamed co-conspirators have engaged in an unlawful contract, combination or conspiracy in unreasonable restraint of trade and commerce in the markets for commercial umbrella and excess insurance coverages.

142. Such contract, combination or conspiracy has consisted of a continuing agreement, understanding and concert of action among such defendants and co-conspirators, the substantial terms of which were to restrict terms and conditions under which insurance coverages would be available to purchasers of commercial umbrella and excess insurances.

143. For the purpose of forming and effectuating such contract, combination or conspiracy, defendants named in

paragraph 141 and their co-conspirators did those things which they combined and conspired to do, including, but not limited to, the following:

(a) Conducting meetings and discussions among themselves to agree to draft "model" forms and policy language for both umbrella and excess commercial insurance coverages; and

(b) Agreeing upon, drafting, and then promulgating such "model" forms and policy language for use in the umbrella and excess insurance markets.

144. This aforesaid contract, combination or conspiracy has had the following effect, among others: competition in the unregulated markets for commercial umbrella and excess insurance has been unreasonably restrained.

SEVENTH CLAIM FOR RELIEF

STATE LAW CLAIM:
VIOLATIONS OF THE
CONNECTICUT ANTI-TRUST ACT

145. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-144 above with the same force and effect as if here set forth in full.

146. The aforesaid contracts, combinations, or conspiracies in unreasonable restraint of trade and commerce are in violation of the Connecticut Anti-Trust Act, Conn. Gen. Stat. §§ 35-26 and 35-28.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment in its favor and that the Court:

147. Adjudge and decree that defendants and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 and the

Connecticut Anti-Trust Act, Conn. Gen. Stat. §§ 35-26 and 35-28.

148. Enjoin defendants, their officers, directors, employees, agents, successors, assigns, subsidiaries, members, and all other persons acting or claiming to act on their behalf, from in any manner, directly or indirectly, continuing, maintaining, or renewing the combinations or conspiracies hereinbefore alleged, and from engaging in any other combination, conspiracy, contract, agreement, understanding, or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

149. Order defendant trade associations to maintain accurate records of all attendees at every meeting of its Board, Executive Committee, or other committee or subcommittee meetings convened under its auspices, and to make a verbatim record of each such meeting, including meetings held by conference call, and to maintain such records for a period of at least five years after the dates of such meetings, and to make such records available, upon written request, to the Antitrust Department of the Office of the Attorney General of plaintiff State of Connecticut.

150. Order defendant trade associations to maintain true and correct copies of all speeches, press releases, official publications, and other public statements by an officer, director, employee, agent, or other person acting on behalf of it, or acting in a capacity reasonably likely to be taken to be on behalf of it and to make such available, upon written request, to the Antitrust Department of the Office of the Attorney General of plaintiff State of Connecticut.

151. Order defendant ISO to issue forms or form coverage parts which include all of the elements of the original 1984 ISO CGL forms, as thereafter lawfully amended.

152. Order defendant ISO to maintain statistical and rating support for the 1973 ISO CGL form and for the 1984 ISO CGL forms.

153. Order defendant ISO to provide any and all data maintained by ISO or received by ISO to any person, firm, public agency, or other entity requesting such data, conditioned only on payment of a reasonable, cost-based fee.

154. Order that defendant ISO be restructured in such manner as the Court determines is necessary to prevent further anticompetitive conduct.

155. Order each defendant reinsurer, and each member of the RAA to withdraw, in writing, any requirement it has imposed on any primary insurer that it exclusively implement claims-made forms for any of its CGL lines of business or which declare or create a boycott of any line or class of insurance, or any coverage part, and to submit copies of all such withdrawals to the Court and the Antitrust Department of the Office of the Attorney General of the State of Connecticut.

156. Enjoin defendants Thomas A. Greene, R. K. Carvill Co., and Ballantyne McKeane from providing information to any reinsurer on the prices, terms or conditions being imposed by any other reinsurer except as may be necessary in the course of negotiating a specific reinsurance contract on behalf of a specific, bona fide purchaser of reinsurance.

157. Enjoin each and every defendant from conditioning insurance or reinsurance on the insured's support for any action by any governmental entity or trade association.

158. Order all defendants to develop individual antitrust compliance programs, and manuals detailing same, to be approved by the Court, on notice to plaintiff, and to report on an annual basis for five years to the Court

and plaintiff's counsel with regard to compliance efforts pursuant thereto.

159. Order each and every defendant to establish and maintain a fund for the benefit of plaintiff and the parties on whose behalf this action has been brought for claims for which such persons would have had coverage but for defendants' violations of law.

160. Award three times the damages incurred by plaintiff and the parties upon whose behalf this action has been brought as a consequence of the aforesaid contracts, combinations or conspiracies.

161. Order each defendant to pay plaintiff State of Connecticut civil penalties in an amount to be determined by the Court, in accordance with Conn. Gen. Stat. § 35-38.

162. Order such other, further and different relief as the nature of the case may require and the court may deem just and proper.

163. Order defendants to pay plaintiff's costs of, and attorneys fees associated with, presenting this action.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, and Rule 200-4, Local Rules, United States District Court, Northern District of California, Plaintiff demands trial by jury for all of the issues pled herein so triable.

DATED: June 14, 1988

JOSEPH I. LIEBERMAN
Attorney General of Connecticut

By: /s/ [Illegible]
ROBERT M. LANGER
WILLIAM M. RUBENSTEIN
Assistant Attorneys General
110 Sherman Street
Hartford, Connecticut 06105
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-88-1688-WWS
(All Cases)

IN RE: INSURANCE ANTITRUST LITIGATION

PRE-TRIAL ORDER NO. 2

[Filed Sep. 8, 1988]

A Status Conference having been held in open court on June 23, 1988, and good cause appearing.

IT IS HEREBY ORDERED that:

1. This Order and Pretrial Order No. 1 shall apply to all cases which are now or hereafter may be related to or consolidated with these proceedings.

2. *Answers.* No further answers shall be filed, including any answer to any complaint in actions hereafter related to or consolidated with these proceedings, until further order of the Court. Any party may for good cause make application to the Court for such an order.

3. *Motions, briefing schedule.* The Court establishes the following schedule for the filing of and response to motions under Rules 12 and 56 of the Federal Rules of Civil Procedure:

a. By December 16, 1988, the parties shall file and serve those motions which they believe are dispositive of any claim or issue in this litigation based on the facts alleged in the complaints and other relevant information in their possession. Motions shall not be filed that turn on

disputable issues of evidentiary fact. Any party may join into any motion by filing a statement to that effect.

b. By April 28, 1989, the parties shall file and serve their responses, including cross-motions for summary judgment, to the dispositive motions.

c. Within 21 days after the filing of responses by the States, the private plaintiffs shall file and serve any supplemental response on issues which they deem not to have been fully covered by the States. The private plaintiffs shall also file statements indicating the motions in which they join.

d. By June 16, 1989, the parties shall file and serve their replies to the responses to the dispositive motions and any responses to cross-motions.

e. By June 30, 1989, the parties shall file and serve their replies to responses to cross-motions.

f. On July 7, 1989, or such other date as the Court may fix, argument on the motions shall be heard.

g. To the extent that such motions are filed under Rule 12 of the Federal Rules of Civil Procedure, the motions need not include all defenses or objections available to the moving party(s), notwithstanding the provisions of Rule 12(g), and no objection or defense not included shall be deemed waived, notwithstanding the provisions of Rule 12(h)(1).

4. *Page limitation.* To the extent that motions, responses and replies made pursuant to paragraph 3 above raise certain common legal issues, not more than one memorandum of law addressed to each such common issue shall be submitted on behalf of either the States or the defendants. Each such memorandum of law shall be subject to the 25-page limit. The application of Local Rule 220-4 is to this extent waived. For purposes of this paragraph only, the McCarran-Ferguson Act, *Parker v. Brown*, the Noerr-Pennington doctrine and subject matter jurisdiction shall each be deemed to constitute a single legal issue.

5. *Discovery schedule and limitation.* Discovery may be conducted by the parties, to the extent necessary to bring or respond to the motions outlined in paragraph 3, until December 16, 1988. Such discovery shall be further limited to matters which are not expected to raise disputable issues of fact. Specifically, no discovery shall seek evidentiary facts known to and contentions made by an opposing party bearing on the liability of the discovering party. After motions have been filed, upon specific request by any party having to respond to a motion, the Court may permit specified discovery for that purpose. Similarly, any party having to reply to a responsive brief may, for good cause, apply to the Court for leave to conduct specific discovery for the limited purpose of such reply.

The parties are encouraged to exchange relevant information in aid of the proceedings outlined in this Pretrial Order.

6. *Class certification motions stayed.* Pursuant to Local Rule 200-6(c), institution of any proceedings related to class determination pursuant to Rule 23 of the Federal Rules of Civil Procedure is stayed until further order.

7. No letter or other communication or proposed order (except any proposed order submitted with any duly noticed motion), including any emergency communication or application, shall be addressed to the Court without prior service upon all other parties and actual prior receipt by a facsimile transmission to all Administrative Liaison Counsel not less than twenty-four hours before delivery to the Court.

8. The parties shall meet and confer with regard to a protective order and a retention order for these proceedings and submit them to the Court when agreement is reached, or failing agreement, seek guidance from the Court through a conference call arranged by Administrative Liaison Counsel.

9. Guido Saveri and his firm, Saveri & Saveri, is appointed to serve as Administrative Liaison Counsel for the private plaintiffs.

IT IS FURTHER ORDERED that paragraphs 2, 3, and 4 of Pretrial Order No. 1 be revised, as follows:

2. The Court shall maintain a master docket and case file entitled "In re Insurance Antitrust Litigation:" under master file number C-88-1688-WWS. All orders, pleadings, motions and other documents shall be filed and docketed only in the master case file and shall be deemed filed and docketed in each individual case to the extent applicable.

3. Orders, pleadings, motions and other documents shall bear the same caption as this Order. If generally applicable to all consolidated actions, such papers shall state below the civil action number "(All Cases)". If applicable only to a particular case or cases, such papers shall bear as a double-caption the same caption as this Order and the caption of the individual case and, immediately above the civil action number of the individual case, shall state "Also relates to:". The filing party shall provide the clerk with the original and one copy of all such documents.

4. Documents shall be served as follows:

(a) The clerk shall provide one copy of any order or other communication of the court to each Administrative Liaison Counsel for him to distribute to the other counsel and parties for whom he has been appointed;

(b) Each pleading or document required to be served shall be served by hand on each Administrative Liaison Counsel whose office is in the city of the person making the service; otherwise service shall be by overnight mail. Service shall also be made upon one attorney for each other party in all related and consolidated proceedings. Each party shall designate the attorney upon whom

service shall be made. Service of such papers shall be by first class United States mail and, only for purposes of calculating when a subsequent paper must be served or filed, service shall be deemed effective seven (7) days after mailing. Administrative Liaison Counsel shall prepare and update as necessary a list of counsel for each party for purposes of service. Such lists and any updates shall be provided to all parties.

IT IS SO ORDERED.

DATED: September 8, 1988

/s/ William W Schwarzer
WILLIAM W SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-88-1688-WWS
(All Cases)

IN RE: INSURANCE ANTITRUST LITIGATION

PRE-TRIAL ORDER NO. 4

[Filed Jan. 3, 1989]

In its Pre-Trial Order No. 2, filed September 8, 1988, the Court ordered that by December 16, 1988, "the parties shall file and serve those motions which they believe are dispositive of any claim or issue in this litigation based on the facts alleged in the complaints and other relevant information in their possession. Motions shall not be filed that turn on disputable issues of evidentiary fact. Any party may join into any motion by filing a statement to that effect."

Defendants have now filed several motions, including motions for summary judgment by several reinsurer defendants on the ground that there is no evidence indicating that they were parties to any illegal agreement ("no-conspiracy motions"). The Court defers decision on the no-conspiracy motions until after decision has been entered on pending motions based on dispositive legal issues, and no such motions shall be filed without further order of the Court.

IT IS SO ORDERED.

DATED: January 3, 1989

/s/ William W Schwarzer
WILLIAM W SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 88-1688 WWS
(All Cases)

IN RE INSURANCE ANTITRUST LITIGATION

STIPULATION RE SUSPENSION OF PLAINTIFF STATES' DISCOVERY AGAINST DEFENDANTS

[Filed March 29, 1989]

The Plaintiff States (hereinafter "the States") and all Defendants (hereinafter "Defendants") hereby stipulate and agree as follows:

1. On November 8, 1988, the Plaintiff States served by mail the following discovery requests:

a. Plaintiff States' First Interrogatories to Defendant Primary Insurers;

b. Plaintiff States' First Request for Production of Documents to Defendant Primary Insurers;

c. Plaintiff States' First Interrogatories to Defendant London Reinsurers;

d. Plaintiff States' First Request for Production of Documents to Defendant London Reinsurers;

e. Plaintiff States' First Interrogatories to Defendant U.S. Reinsurers;

f. Plaintiff States' First Request for Production of Documents to Defendant U.S. Reinsurers;

g. Plaintiff States' First Interrogatories to Defendant Brokers;

h. Plaintiff States' First Request for Production of Documents to Defendant Brokers;

i. Plaintiff States' First Interrogatories to Defendants ISO and RAA; and

j. Plaintiff States' First Request for Production of Documents to ISO and RAA.

2. Under the civil rules and Pretrial Order No. 2, the discovery requests imposed an obligation to respond or object on or before December 15, 1988.

3. On November 23, 1988, representatives of the States and representatives of Defendants participated in a telephone conference call to discuss the States' discovery requests. During the call the States' representatives stated that the discovery requests were designed to elicit information needed to respond to factual issues anticipated in three motions which the States expected Defendants to file on December 16, 1988: *i. e.* motions directed to (1) extraterritoriality/comity; (2) standing; and (3) antitrust injury.

4. During the same conference call, representatives of Defendants represented and later confirmed by letter, that:

a. any defense motions on extraterritoriality/comity and standing will be addressed to the allegations of the complaints and are not intended to introduce any factual questions;

b. the defendants do not intend to bring a separate motion on antitrust injury and if the issue is referenced in any other motion, the legal issue will be discussed without introducing facts outside the allegations of the complaints; and

c. none of the foreign defendants intends to contest personal jurisdiction in this group of motions.

5. Based on the foregoing assurances Defendants requested, and the States agreed, that the Defendants' obligation to respond or object to the States' discovery be suspended at least until defendants' motions have been filed.

6. The Defendants' motions are consistent with the Defendants' representations and accordingly the States have agreed that Defendants' obligation to respond or object to the States' discovery shall be suspended until further notice.

DATED this 30th day of January, 1989.

For the Plaintiff States:

/s/ James M. Beaulaurier
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(Names and addresses for other counsel for Plaintiff States appear on attached Master Service List of Plaintiff States)

For Defendants

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/s/ Richard de Saint Phalle
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Administrative Liaison Counsel for Defendants
Attorney for Defendant Hartford Fire Insurance Company

(Names and addresses for other defense counsel appear on attached Defendants' Service List)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 88-1688 WWS
(All Cases)

IN RE INSURANCE ANTITRUST LITIGATION

PRETRIAL ORDER NO. 6
[Filed Mar. 29, 1989]

ORDER SUSPENDING PLAINTIFF STATES' DISCOVERY AGAINST DEFENDANTS

The Court having considered the Stipulation re Suspension of Plaintiff States' Discovery Against Defendants and good cause appearing,

IT IS HEREBY ORDERED *NUNC PRO TUNC*, THAT:

The defendants' obligation to respond to the discovery served by the plaintiff states on November 8, 1988, is suspended until the plaintiff states both provide written notification of the reinstatement of any such discovery against any defendant and also obtain leave of this Court to conduct such discovery.

DATED: 3/29/89

/s/ William W Schwarzer
WILLIAM W SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C-88-1688-WWS
(All Cases)

IN RE INSURANCE ANTITRUST LITIGATION

AFFIDAVIT OF CAROLE BANFIELD

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CAROLE BANFIELD being duly sworn states as follows:

1. I am Senior Vice President, Government Relations at Insurance Services Office, Inc. ("ISO"). I was an employee of Insurance Services Office when it was formed in 1971 and have had supervisory responsibility for the Government Relations Department since 1979. I have read the Defendants' Motion For Judgment On The Pleadings Or, In The Alternative, Summary Judgment On McCarran-Ferguson Grounds, and I make this affidavit in support of that motion.

2. ISO is a non-profit corporation of over 600 member insurance companies. ISO is licensed in all 50 states as a rating, rate service or advisory organization for property and casualty lines of insurance. One of its primary functions is to develop standardized property and casualty insurance policy forms that comply with statutory standards and are acceptable to insurance departments in all states for use in providing insurance.

3. Since 1977, I have been in charge of providing state insurance regulators with information about ISO filings including newly filed ISO policy forms and of responding to their questions and concerns. I have also worked closely with state insurance regulators in these and other areas. Additionally, I have served as a member of numerous advisory committees of the National Association of Insurance Commissioners, an association made up of regulators from all 50 states.

4 Beginning in March 1984 ISO filed, with insurance departments in every state, two proposed new versions of a standardized policy form for general liability insurance, known as the Commercial General Liability ("CGL") form. I supervised those filings, which were made on behalf of participating insurers. CGL forms are designed to provide insurance coverage to businesses and governmental entities against the risk of liability to third parties for bodily injury or property damage.

5. The new versions of the CGL form were intended to replace an old standardized policy form for general liability insurance that had been filed with state insurance departments in 1973. That form had been accepted by insurance departments and was available for use in every state. (A copy of that form is attached as Exhibit A).

6. The new forms, as proposed in March 1984, significantly redesigned the 1973 form and modified the insurance coverage provided. The 1973 policy form provided coverage for bodily injury and property damage occurring during the policy period (this is known as an "occurrence" form). One of the new CGL policy forms, as proposed in March 1984, was also an occurrence form, but the terms and conditions of coverage were modified in many respects. The second proposed new CGL form provided coverage for bodily injury and property damage for which a claim is made during the policy period or extensions thereof (this is known as a "claims-made" form). (The coverage

parts of these proposed forms are attached as Exhibits B and C). Claims-made policy forms had previously been developed by ISO and others for different lines of insurance, such as medical malpractice.

7. When ISO filed its proposed new policy forms with state insurance departments beginning in March 1984, we proposed that the forms not become effective until November 1985. As the cover letter to those filings indicates, we explained to insurance departments that the intervening period would allow them sufficient time to review the new forms thoroughly, would allow producers, consumers and other interested groups sufficient time to consider the changes in the new forms, and would allow ISO sufficient time to explain the changes and to file with insurance departments all of the additional information (*e.g.*, advisory rates, rules, endorsements) needed to use the new forms. (A sample cover letter is attached as Exhibit D). The proposed effective date was later extended into 1986.

8. I, and other ISO employees under my direction, had frequent communications with state insurance departments concerning the proposed new CGL forms during the period (from March 1984 into 1986) when the forms were under regulatory review. We received requests from state insurance regulators for additional information, responded to questions, and had discussions with them about the scope of insurance coverage under the CGL forms. For example, shortly after the March 1984 filing, the Arizona Department of Insurance forwarded written questions about the forms and invited ISO to respond to a number of concerns that had been raised. The following year, the Arizona Department called for a public hearing to discuss numerous concerns it still had concerning the forms. (*See* Arizona documents in Exhibit N.)

9. ISO and the insurance regulators also discussed the proposed new forms with other interested parties, includ-

ing insurers, agents, brokers, domestic and foreign reinsurers, and corporate risk managers. The discussions were sometimes heated and the industry-wide scrutiny was intense. For example, in August 1985 ISO representatives and insurance regulators from Maryland, the District of Columbia, and Virginia met with representatives from the Potomac chapter of the largest association of business insureds, The Risk and Insurance Management Society, Inc. ("RIMS"), to discuss objections that they had raised to the new claims-made form. (Attached as Exhibit E is a copy of the written objections, including objections to the retroactive date provisions, that the Potomac chapter of RIMS forwarded to ISO in advance of the meeting).

10. On many occasions, I and other ISO employees under my direction had discussions with regulators and members of these other groups about concerns and conflicting views expressed about different aspects of the forms. The issues we discussed included: (i) whether the forms should provide an occurrence trigger of coverage, a claims-made trigger or some other type of trigger, and whether ISO should provide a single policy form or alternative forms utilizing two different triggers; (ii) whether or to what extent claims-made coverage should be provided for injuries which occurred before the policy period or from claims which were reported after the policy period; (iii) whether or to what extent the pollution exclusion could or should be modified; and (iv) whether defense costs should be included within the policy limits.

11. During the period from 1984 through 1986, we also attended public hearings and forums before insurance regulators in 35 states at which we and members of these other groups expressed differing viewpoints on the new forms. Attorneys general from some of the states also expressed their views concerning the proposed forms. Numerous changes to the forms, including changes to the

provisions challenged by plaintiffs, were urged upon state insurance regulators and ISO at these hearings. For example, in connection with public hearings before the New York Insurance Department, the Attorney General of New York submitted written comments dated June 12, 1985 opposing the December 1984 provisions relating to pollution coverage and retroactive dates (see paragraph 15 below). (A copy of the comments is attached as Exhibit F).

12. The National Association of Insurance Commissioners met in December 1985, discussed the proposed CGL forms filed by ISO, and adopted a model act relating to certain aspects of claims-made policies. I attended the meetings of NAIC and the committee that recommended adoption of such a model act. Both before and after those meetings, ISO made a number of changes to the CGL forms in response to the points raised at the meetings and to the requirements of the model act.

13. Differing viewpoints on the proposed forms, and in particular on the provisions now challenged by plaintiffs, also appeared in the press. (Attached as Exhibit G is a sample of the press articles).

14. In response to the various opinions expressed and to regulatory actions discussed in paragraph 17, ISO revised the proposed forms four times before the ISO CGL program became effective beginning on January 1, 1986. I supervised the filing with state insurance departments of each of the four revisions. Each of these supplemental and amended filings included a description of significant changes in the forms. Exhibit H hereto is a chart reflecting the various ISO filings, hearings thereon in the states that are plaintiffs or in which private plaintiffs reside, and approvals, disapprovals and effective dates for use of the policy forms in those states.

15. Plaintiffs in this case challenge certain provisions relating to retroactive dates and pollution coverage. Those

provisions were included in the first set of revisions that ISO filed in December 1984, before most of the state regulatory proceedings relating to the new forms took place. The retroactive date provision did not impose any standardized restriction on retroactive coverage but instead provided insurers and insureds another means of adding such a restriction to the policy if they chose to do so. The revised pollution exclusion afforded narrower coverage than the March 1984 filings, but the transmittal letter for the December filings advised that ISO would draft an optional endorsement and separate pollution liability policy forms providing broader coverage. (Exhibit I is a sample transmittal letter; Exhibits J and K are the December 1984 occurrence and claims-made filings). In 1985, ISO filed such an endorsement as a standardized optional amendment to the new CGL forms and also filed two separate pollution liability policy forms. (See Exhibits L and M).

16. ISO identified and explained each of these changes in the materials that accompanied the December 1984 filings; and noted that the changes had arisen out of a "review and dialogue with a broad range of industry interests, including producer organizations, domestic and foreign reinsurers and our own participating insurers." (Exhibit I, p. 1.) In addition, I highlighted these changes for insurance regulators at the December 1984 meeting of the Property and Casualty Insurance (D) Committee of the National Association of Insurance Commissioners. These changes were subsequently discussed in numerous conversations that I had with insurance department officials before the final revised forms became effective in early 1986 and at many of the public hearings and forums called by state insurance regulators. For example, at a forum called by insurance regulators from 19 states on July 25, 1985, representatives from ISO, certain U.S. casualty insurers, domestic and foreign reinsurers and trade associations expressed their views on the proposed revisions to the terms and conditions of the CGL forms.

17. Numerous states, including plaintiffs Connecticut, Illinois, Michigan, Minnesota, Washington, and West Virginia, disapproved or refused to approve the revised forms filed in December 1984 and or in 1985, but subsequently approved the forms after additional modifications were made. (Insurance department letters reflecting such changes in position are attached as Exhibit N, and the 1986 versions of the coverage parts are attached as Exhibits O and P). Some of these subsequent modifications related to the provisions that had been added in December 1984—for example, limitations on the primary insurers' ability to advance the retroactive date in the claims-made form (if one had been established) were added in 1985.

18. Certain interested groups, including RIMS, also withdrew their opposition to the forms as revised in December 1984 after additional revisions were made to other provisions in the forms by early 1986. (The RIMS letter withdrawing opposition—but continuing to criticize various aspects of the forms, particularly the claims-made form—is attached as Exhibit Q).

19. Only two states, Massachusetts and New Jersey, declined to approve both 1986 versions of the CGL form. In those states, the old 1973 form is still in use. Both of those states were among the 35 that held public hearings or forums in which I or persons reporting to me participated. Four other states—Nebraska, New York, Texas and Vermont—rejected the 1986 version of the claims-made form but approved the 1986 version of the occurrence form. All four were also among the states that held public hearings before deciding whether to approve the 1986 version of the new forms.

20. Massachusetts and New Jersey have approved endorsements to the old 1973 form that include limitations on pollution coverage identical to those provided in the 1986 CGL forms approved in other states. The revised pollution language (as well as separate policy forms and

endorsements providing broader pollution coverage) is thus available in all 50 states.

21. None of the versions of the new CGL form filed by ISO ever included defense costs within the specified coverage limits.

22. In June 1986, ISO provided insurance companies with advisory material (Exhibit R regarding excess and umbrella insurance*). This material was expressly designed "to assist companies in developing their own Commercial Umbrella Liability policy forms," and it included language that would—if used by the insurance companies—dovetail with ISO's new CGL policy forms and avoid possible coverage gaps. The material was not a policy form and was not filed with the state insurance departments. The advisory material prepared by ISO addresses concerns expressed by certain insurance regulators that gaps in the coverage available under primary, excess, and umbrella policies be avoided. (Examples of documents reflecting such expressions of concern are included as Exhibit S).

/s/ Carole Banfield
CAROLE BANFIELD

Subscribed and sworn
to before me this
8th day of December, 1988

/s/ Joseph P. Giasi, Jr.
Notary Public

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* Excess policies provide additional coverage beyond that provided in the underlying policy, namely, coverage at higher dollar amounts than the limits set in the underlying policy. Umbrella policies provide both excess coverage and coverage for liability exposures not insured in the underlying policy.

MAJOR CGL PROGRAM POLICY FORM FILINGS IN PLAINTIFF STATES

State	Initial Form Filing[1]	First Revision Filing[2]	Second Revision Filing[3]	Third Revision Filing[4]	Fourth Revision Filing[5]	Hearing Dates	Regulatory Dispositions	Effective Date
Alabama	03/07/84	12/05/84	02/12/85	10/28/85	01/17/86	—	Approved—01/21/86	02/01/86
Alaska	03/02/84	12/04/84	02/13/85	10/28/85	01/16/86	10/09/85	Filing A Deemed Approved—04/30/84 Filing B Deemed Approved—01/06/85 Filing C Deemed Approved—02/25/85 Filing D Deemed Approved—11/04/85 Filing E Deemed Approved—02/19/86	02/01/86
Arizona	03/05/84	12/04/84	02/13/85	10/28/85	01/17/86	06/20/85, 07/25/85*	Disapproved—12/17/85 Approved—02/07/86	02/07/86
California‡	03/06/84	12/04/84	02/14/85	10/28/85	01/20/86	—	—	Available For Use—02/01/86
Colorado‡	03/06/84	12/04/84	02/13/85	10/28/85	01/17/86	—	—	Available For Use—02/01/86
Connecticut	03/08/84	11/30/84	02/15/85	10/28/85	01/17/86	07/25/85*, 11/13/85**	Disapproved—07/12/85 Disapproved—12/31/85 Approved—02/05/86	02/05/86
Florida	03/05/84	12/05/84	02/14/85	10/31/85	01/16/86	07/25/85*, 05/02/86	Approved—01/27/86	02/01/86
Illinois	03/07/84	12/04/84	02/15/85	10/28/85	01/16/86	07/25/85*, 08/28/85, 11/13/85**	Disapproved—04/15/84 Disapproved—12/30/85 Approved—01/27/86	02/01/86
Maryland	03/08/84	12/04/84	02/12/85	10/28/85	01/16/86	05/10/84, 02/13/85 07/15/86	Filings A, B, C Approved—06/03/85 Filing D Approved—11/21/85 Filing E Approved—01/23/86	02/01/86
Massachusetts	03/08/84	11/30/84	02/15/85	10/28/85	01/17/86	06/27/86 to 07/14/86	Filing A Approved—04/17/84 Filing B Approved—12/13/84 Filing C Approved—02/27/85 Approvals Withdrawn by Stipulation—06/27/86 Unbundled Occurrence Form Filed—05/01/86	Not Approved

[1] See Notes to Filings.
[2] See Notes to Filings.
[3] See Notes to Filings.
[4] See Notes to Filings.
[5] See Notes to Filings.
* First Illinois Forum
** Second Illinois Forum
‡ Filings not required by state law, informational filings made by ISO.

MAJOR CGL PROGRAM POLICY FORM FILINGS IN PLAINTIFF STATES—Continued

State	Initial Form Filing[1]	First Revision Filing[2]	Second Revision Filing[3]	Third Revision Filing[4]	Fourth Revision Filing[5]	Hearing Dates	Regulatory Dispositions	Effective Date
Michigan	—	12/11/84	02/15/85	10/28/85	01/17/86	07/25/85*, 11/13/85**	Disapproved—12/04/85 Unbundled Occurrence Form Filed—03/14/86 Unbundled Occurrence Form Approved—05/01/86 Unbundled Claims Made Form Filed—11/19/86 Unbundled Claims Made Form Approved—12/30/86	Occurrence Form—05/01/86 Claims Made Form—01/01/87
Minnesota	03/05/84 (Filing Withdrawn 11/16/84)	12/04/84	02/25/85	10/28/85	01/16/86	07/25/85*, 10/23/85, 11/13/85**	Disapproved—09/04/85 Disapproval Affirmed—12/20/85 Approved—04/08/86	04/08/86
Montana	03/02/84	12/04/84	02/13/85	10/28/85	01/16/86	—	Filing A Approved—03/16/84 Filing B Approved—12/10/84 Filing C Approved—02/20/85 Filing D Approved—10/31/85 Filing E Approved—01/21/86	02/01/86
New Jersey	03/08/84	12/04/84	02/14/85	10/28/85	01/23/86	10/11/85, 11/13/85** 12/18/85	Disapproved—12/31/85 Unbundled Occurrence Form Filed—05/02/86 Unbundled Occurrence Form Disapproved—06/06/86	Not Approved
New York	03/13/84	12/05/84	02/14/85	10/29/85	01/17/86	05/16/85, 07/25/85*	Disapproved—10/11/85, 02/12/86 Unbundled Occurrence Form Filed—03/17/86 Unbundled Occurrence Form Approved—03/21/86	09/01/86—Occurrence Form Only

[1] See Notes to Filings.
[2] See Notes to Filings.
[3] See Notes to Filings.
[4] See Notes to Filings.
[5] See Notes to Filings.
* First Illinois Forum
** Second Illinois Forum
‡ Filings not required by state law, informational filings made by ISO.

MAJOR CGL PROGRAM POLICY FORM FILINGS IN PLAINTIFF STATES—Continued

State	Initial Form Filing[1]	First Revision Filing[2]	Second Revision Filing[3]	Third Revision Filing[4]	Fourth Revision Filing[5]	Hearing Dates	Regulatory Dispositions	Effective Date
Ohio	03/06/84	12/05/84	02/14/85	10/29/85 (Filing Withdrawn 12/24/85)	03/19/86	11/13/85**	Unbundled Occurrence Form Filed—03/17/86	05/01/86
Pennsylvania	03/08/84	12/04/84	02/14/85	10/28/85	01/16/86	07/25/85*, 11/13/85**, 04/04/86	Approved—07/02/86	09/01/86
Washington	03/19/84	12/04/84	02/13/85	10/28/85	06/04/86	06/26/86, 07/31/86	Disapproved—12/20/85 Unbundled Occurrence Form Filed—03/14/86 Unbundled Occurrence Form Disapproved—03/20/86 Unbundled Occurrence Form Approved—06/12/86 Claims Made Form Approved—11/26/86, 01/16/87	Occurrence Form—07/15/86 Claims Made Form—01/01/87
West Virginia	03/06/84	12/05/84	02/13/85	10/29/85	01/16/86	—	Disapproved—05/04/84 Approved—05/29/86	07/01/86
Wisconsin	03/07/84	12/04/84	02/15/85 (Filing Withdrawn and Resubmitted 04/9/85)	10/28/85	01/16/86	07/25/85*	Approved—04/18/85, Undated Approval Received—01/06/86 State Specific Endorsements Filed—03/31/86	02/01/86

[1] See Notes to Filings.
[2] See Notes to Filings.
[3] See Notes to Filings.
[4] See Notes to Filings.
[5] See Notes to Filings.
* First Illinois Forum
** Second Illinois Forum
‡ Filings not required by state law, informational filings made by ISO.

NOTES TO FILINGS

(1) *Initial Forms Filing*—Introduction of simplified occurrence and claims-made forms. The filing included only the two basic policy forms with the understanding that endorsements, rules, classifications and rates would be filed later.

(2) *First Amendment Filing*—(i) The claims-made form was amended by:

(a) Providing for the optional entry of a retroactive date on the declarations page of the policy. Previously a retroactive date or other means of excluding retroactive coverage could have been included by endorsement. Once a retroactive date is inserted by the insurer or its agent, the policy is intended to respond only to bodily injury or property damage occurring after that date for which claim is made during the policy period.

(b) Providing the insured with a 60 day period after non-renewal to decide whether to purchase an optional extended reporting period of unlimited duration ("unlimited duration reporting period") at a price capped at 200% of the expiring policy's annual premium.

(ii) The pollution exclusion in both the claims-made and occurrence forms was revised. The pollution coverage in the basic forms was limited to damages arising out of products or completed operations and certain off-premises discharges of pollutants.

(3) *Second Amendment Filing*—(i) The claims-made form was amended by adding an automatic 60 day extended reporting period upon the expiration of coverage for any reason except non-payment of premiums. During this extended reporting period, the policy would continue to respond to claims made

during the 60 days immediately following the termination of the policy arising from occurrences of injury within the policy period.

(ii) An endorsement for both the claims-made and occurrence forms was filed that, if purchased, would restore certain pollution coverage previously excluded from the basic forms.

(4) *Third Amendment Filing*—The claims-made form was amended by:

(a) Adding an automatic five-year extended reporting period upon termination of the policy for any reason (except for non-payment of premiums), advancement of the retroactive date or replacement of the policy with an occurrence type policy. Under this provision, any claims resulting from occurrences of injury which occurred and were reported to the insurer during the policy period would be covered if made within five years of the termination of the policy. This provision would not apply if another insurance policy covered the claim.

(b) Providing that a claim would be deemed to have been made when notice of such claim was "received and recorded" by the insured or insurer. This change eliminated the requirement of written notice of a claim.

(c) Providing a manual rule limiting the conditions under which a retroactive date could be advanced.

(d) Filing an endorsement reinstating policy aggregate limits during the unlimited duration reporting period for previously unreported occurrences of injury.

(5) *Fourth Amendment Filing*—(i) The claims-made form was amended by:

(a) Providing that the first named insured, upon written request, is entitled to information on paid and reserved loss amounts and occurrences of injury reported directly to the insurer. Such information would be provided automatically upon cancellation or non-renewal by the insurer.

(b) Providing that cancellation for non-payment of premiums would no longer bar the 60-day and 5-year automatic extended reporting periods.

(c) Revising the unlimited duration reporting period endorsement to incorporate supplemental aggregate limits equal to those in effect at the termination of the policy for claims first received and recorded during the optional extended reporting period.

(ii) Both the occurrence and claims-made forms were amended to require the insurer to give the insured 30 days' written notice if the insurer elects not to renew the policy.

[EXHIBIT I]

[INSURANCE SERVICES OFFICE, INC.
LETTERHEAD]

December 4, 1984

Honorable S. David Childers
Director of Insurance
Department of Insurance
1601 West Jefferson
Phoenix, Arizona 85007

GL 84-084CP (A)
Commercial General Liability Policy
Versions: CG 00 01 and CG 00 02
Common Policy Conditions IL 00 17

Dear Director:

On behalf of those participating companies which have authorized Insurance Services Office, Inc. to do so, we hereby file an amendment to the captioned filing, which was submitted under date of March 5, 1984 to become effective November 1, 1985. The attached amendment includes a new Commercial General Liability Policy form, in two versions. Submitted with the forms is an Explanatory Memorandum, as well as General Instructions, optional Quick References and advisory Declarations pages.

Our previous filings of Rules (GL 84-084RU), Classifications (GL 84-084CT) and Endorsements (GL 84-084EP) to be used with this Program will be supplemented to incorporate the changes made to the coverage Forms as well as to include material not previously submitted.

As noted in the attached Explanatory Memorandum, ISO's new Commercial General Liability policy has been the subject of review and dialogue with a broad range of industry interests, including producer organizations, domestic and foreign reinsurers and our own participating insurers. During the several months since the Commercial General Liability policy was submitted to regulation, the industry review has continued to affect the design of the new program.

As outlined below and as detailed in the attached Explanatory Memorandum, the product of this most recent review involves substantive change to the policy forms—both in the "claims-made" and "occurrence" versions—and to the proposed rules of application to the program.

The attached "claims-made" version of the CGL Policy, CG 00 02, now incorporates a Retroactive Date provision. This provision, to be keyed by appropriate entry on the Declarations, is common to most "claims-made" contracts now in the marketplace; its insertion as a standard policy provision will mean that the policy will not respond to bodily injury or property damage which occurs before the Retroactive Date shown. In the "claims-made" form previously submitted, a Retroactive Date would have been made available only by endorsement.

Safeguards to protect the insured from potential coverage gaps have been built into Section V—Extended Reporting Period Option of the "claims-made" form; the Extended Reporting Period Endorsement ("tail") will be available to the insured if the company renews the policy with a retroactive date later than that in the policy renewed, or if the policy is renewed with an "occurrence" form.

Additional changes to Section V includes:

An extension in the period of time during which the insured may elect to purchase the "tail" after policy termination. The amended "claims-made" form now provides that the insured has a 60-day period to exercise the "tail" option when he or the company nonrenews. Cancellation by either party will result in a 30-day period—which amounts, in effect, to 60 days upon company cancellation since the company must give 30 days notice of policy cancellation.

> The maximum price for the Extended Reporting Period Option as well as a listing of price determinants are now incorporated within the policy.

As originally submitted, both versions of the Commercial General Liability policy incorporated a limited scope of coverage for pollution liability, as intended under current contracts. But the intended scope of coverage continues to be expanded by court interpretation. Taking this trend into account, it is the consensus of our insurer committee that the attempt to strengthen and clarify the policy language in the original edition of the CGL might fare no better in the courts than the current wording.

Accordingly, the program as amended contemplates a new approach: the basic CGL contracts now exclude coverage for bodily injury, property damage and associated expenses arising from the discharge of pollutants. This exclusion does not run, however, to damages arising out of products or completed operations and to certain off-premises discharges of pollutants. Underscoring current intent, clean-up and other costs are now subject to specific exclusion.

Future submissions will include coverage mechanisms for pollution liability; as an optional endorsement available with both versions of the CGL policy, coverage will be available for both sudden and non-sudden events, but not for clean-up and associated expenses. Additional coverage will be available under the "claims-made" Pollution Liability Coverage Parts.

The "GL" prefix for the Commercial General Liability forms is changed with this amendment to "CG" to avoid the confusion between the current and new programs. Forthcoming amendments to the Commercial General Liability endorsements portfolio, classifications and rules will carry through this change to the balance of the new program.

The lead-time requirements of our participating companies to implement the new CGL program, as well as the Commercial Lines Policy and Rating Simplification program in its entirety, have resulted in a revised proposed effective date for the captioned filing. Therefore, ISO proposes that the new forms become effective on January 1, 1986 under the following rule of application:

> The Commercial General Liability Policy, versions CG 00 01 and CG 00 02 with the Common Policy Conditions, is available for use with policies written on or after January 1, 1986. Any participating insurer may select any other date up to January 1, 1987 with appropriate Insurance Department notification.

With this flexible implementation rule, ISO will continue to provide full rule and rate service for the current policy forms until January 1, 1987.

Before closing, I have been asked to remind you that ISO has no adherence requirements. ISO's policy forms and explanatory materials are intended solely for the information and use of ISO's participating insurers and their representatives. Those forms and materials cannot eliminate all uncertainy as to whether or how insurance applies in every set of circumstances. Neither ISO's general explanations of policy intent (including hypothetical examples) nor opinions expressed by members of ISO's staff necessarily reflect every insurer's views or control any insurer's determination of coverage for a specific claim. ISO neither interprets insurance policies for the contracting parties nor intercedes in coverage disputes.

We will appreciate your early review and approval of this filing, and will be glad to respond to any questions you may have.

Very truly yours,

/s/ Michael L. Vetter
MICHAEL L. VETTER
Regional Manager

[EXHIBIT N]

NOTICE OF DECISION

YOU ARE HEREBY NOTIFIED, that pursuant to Section 38-201n(c) of the Connecticut General Statutes, the undersigned Peter W. Gillies, Insurance Commissioner of the State of Connecticut, has conducted a lengthy and complex investigation of the "claims made system" of insurance proposed to be introduced with policy form CG0011185 and CG0021185 filed by the Insurance Services Office Inc. (ISO) on December 5, 1984, and as amended to date. As a part of the investigation, public comment and information was sought at various meetings held in Connecticut as well as in the states of Massachussets, New York and Illinois; with representatives of ISO, the insurance agents association the insurance risk managers, as well as other state insurance regulators.

Based upon this investigation it is determined that ISO's policy form CG0021185 (Claims Made) fails to meet the statutorily imposed requirements of Section 38-370c of the Connecticut General Statutes as applied to professional policies in failing to include provisions for the purchase of prior acts and variable coverage on a contractual basis as required by Section 38-370c of the Connecticut General Statutes. Further, the failure to provide information relative to remaining insurance available to the insured at the time of purchase of an extended tail coverage results in the insured being denied basic information necessary to make an informed judgement.

The ability to charge up to 200% of the last annual premium for the purchase of tail coverage which may range from no insurance, because the aggregate limit has already been exceeded, or the full face value because there have been no claims assessed against the policy, places the insured in the untenable position of having to guess what insurance coverage will remain. Additionally, such a practice results in unfair discrimination, prohibited by Section 38-210c(a). It results in the ability of the insurer not only to charge different prices to different

insureds for the same product, but provides the insurer the ability to impose varying cost price differentials on different customers. When, as in Connecticut, the public's right to know is central to all consumer legislation, and insurance contracts are statutorily required to be written in clear language, this deficiency cannot be tolerated.

ISO's filing of the CGL form is the first revision of the Commercial General Liability policies since 1966. Prior to this time, ISO's CGL policies have been written on an "occurrence" basis (i.e. claims were covered if the event causing the loss "occurred" during the policy period, regardless of when the claim was made). The new Claims Made policy covers only those losses which arise for which claims are presented, during the policy period.

ISO and representatives of all the major insurers and reinsurers assert that the Claims Made Policy Form is necessary for reasons that relate primarily to accurate risk analysis and developments in the field of civil litigation. Their arguments may be briefly summarized as follows:

1. Litigation under the old "occurrence" policy has made underwriting of commercial liability risks difficult, if not in some cases, impossible. The continuing development of theories of civil liability make assessment of coverage requirements for future events impractical. Legal disputes and rulings relating to a determination of when an injury "occurs" have posed a recurring problem to the underwriter. This is particularly true when the injury itself is latent or results from long term exposure, or both. This lack of actuarial predictability impacts adversely upon the ability to accurately assess losses or to properly price for them.
2. ISO's current CGL coverage forms are extremely complex and burdened by numerous endorsements and riders designed to provide coverage generally

applicable to most insureds. To reduce costs and confusion, the current forms and manual rules need to be streamlined, clarified and made more understandable.

3. Because of the difficulty in underwriting the current CGL policy, reinsurers are increasingly opposed to sharing the risk of loss on such lines of coverage. Such coverage as is being provided, is being written by the reinsurer on a claims made basis. The reduction of reinsurance has had the immediate effect of reducing the direct writing insurers' ability to accept new risks, and necessitated substantial premium increases to maintain necessary reserves.

During the course of this Department's inquiry, many concerns have been raised regarding the effect which ISO's Claims Made Policy form would have on the market place. It is generally accepted that, at least as to the insurers, the originally proposed Claims-Made forms would have provided a temporary protection from the uncertainties described above. Nevertheless, approval by this office must be predicated upon a determination that the overall protection of the policyholder has not been adversely effected, and that there is, at the very least, a clear understanding by both parties as to the coverage being provided by the insurance policy.

Initially, ISO's policy form contained provisions which would have the following purposes or effects:

1. Retroactive date of policy (indicating date on which policy coverage attaches) could be unilaterally changed by the insurer at the time of renewal, or by a succeeding insurer, upon the issuance of a new policy.

2. Claims for losses had to be made within 60 days of the end of the policy period. The company could unilaterally offer to extend the claim reporting

period for an additional 5 years with an additional charge of no more than 200% of the original premium.

3. The purchase of an extended claim reporting period would provide no additional insurance if the policyholder had exhausted his aggregate limit, there being no requirements for some minimum run off or tail coverage.

4. The insured was required to notify the company of any occurrence during the policy period which may give rise to a claim. The company could then, at its discretion, take no action, attempt to settle the potential claim, or cancel the coverage prior to a formal claim being made.

5. Upon renewal or replacement of a Claims Made policy with another company the insurer was able to advance the prior policies retroactive date and additionally issue exclusions for particular risks known or suspected to have occurred during the prior policy period, but for which no claim had been filed.

6. An insured whose Claims Made policy was cancelled for non-payment of premium had no right to purchase tail coverage regardless of the reason for the non-payment of premium.

The summarized terms would eliminate a commercial insured's ability to assure himself of full coverage, regardless of the price he was willing to pay. The insurers' ability to cancel, nonrenew, advance retroactive dates, refuse tail coverage, and issue lazer endorsements, all on a unilateral basis, would deny policyholders any reasonable expectation that a Claims-Made policy would ultimately provide the coverage sought.

ISO has consistently asserted that its members would not abuse their policyholders through arbitrary or un-

reasonable exercise of contract rights; and that the use of this policy forms would be generally limited to large commercial insureds with high losses and long indeterminate loss payout periods. It is argued that such consumers are knowledgeable and sophisticated enough to understand the nature and need for these proposed changes. Although this Department would hope that their assertions are accurate, they do not satisfy the insureds need to know the full extent and nature of the coverage being purchased.

The new Claims Made Form is filed for general use. If the ISO filing were approved it could be sold by a member company to any small business as well as the largest corporations in the State. Situations that can be foreseen which would necessitate an insurer taking actions adverse to the interests of the policyholder should be clearly set forth in the policy contract. Insurance contracts need not, and should not, leave policyholders at the mercy of their insurers' good will and unilateral judgement.

ISO, by its various amendments to form filing number GL 84-084CP, has made numerous changes in a good faith effort to eliminate problems disclosed by the current investigation. The most significant changes include the following:

1. An automatic extended tail coverage for claims made within five years of the policy period, and for which notice of occurrence was given during the period from the retroactive date to a date 60 days beyond the end of the policy period.
2. A mandatory offer to extended tail coverage for claims made within five years of the policy period regardless of when the policyholder provides notice of the occurrence.
3. An option (by the company) to increase the original amount of aggregate limit of liability applicable during the period of extended tail coverage.

4. Limitations on the carriers' right to advance a retroactive date only if:
   (a) there is a change in carrier;
   (b) there is a substantial change in the insured's operations causing an increased risk of loss;
   (c) the insured fails to provide the carrier with information which the insured should have known and which was material to the acceptance of the risk or was requested by the carrier; or
   (d) The insured requests such advancement.
5. Prior to the advance of any retroactive date, the insured must acknowledge in writing that all rights to purchase an extended tail have been explained.
6. The company's obligation to provide coverage is triggered when a claim is "received and recorded" either by the insured or the company.

With these and other changes ISO made significant progress toward eliminating the deficiencies of the original Claims Made filing. However, several key problems remain. Although ISO has indicated a willingness to continue working towards their elimination, policy form number CG0021185 cannot be approved until they are addressed.

Although the changes offered by ISO will allow most policyholders to elect extended tail coverage, the election would in all cases be exercised in the absence of any information needed to make the choice. Any policyholder with paid or outstanding claims, or notice of occurrences having arisen during the policy period, would have reason to believe some portion of his aggregate limit had been used up. He would not know how much remained, and in any event he would have no right to any addition to the

aggregate limit to cover unknown or unliquidated claims during the extended tail coverage period. The inability to obtain information relative to remaining coverage, and the absence of a contractual right to purchase a minimum aggregate limit, should such information dictate the need for it, places the insured in an untenable position. He neither knows how much coverage he has, nor does he have a contractual right to acquire such minimum coverage. Additionally, without this information, the insured would have no basis for pricing such tail coverage with other insurers if he sought less costly comparable coverage. The insurer on the other hand has such data available and will be entitled to charge 200% above the last premium for what may be nonexistent coverage.

Such results are, in and of themselves, a sufficient cause to disapprove the Claims Made Policy form.

The only way in which this deficiency can be corrected is by establishing a minimum aggregate limit of liability available during the extended tail coverage period and requiring that the company give each policyholder the following information:

1. All information on closed claims including the date and description of occurrence, and amount of payments, if any;
2. All information on open claims including date and description of occurrence, amount of payments and amount of reserves, if any; and
3. All information on notice of occurrence including date and description of occurrence and amount of reserves, if any.

Other significant deficiencies in the policy form remain to be addressed. The rights of policyholders to extended tail coverage if they are cancelled due to non-payment of premium have not been addressed. No justification exists for omitting such rights on the assumption that the

policyholder is less deserving. The optional purchase of tail coverage is itself dependent upon the payment of any premium charged and the company therefore would incur no unforeseen or uncompensated liability for providing such rights.

Although it is the understanding of this Department that a separate filing addressing the question of defense cost within aggregate limits is being considered, no changes have been made to eliminate the allocation of defense litigation costs to the policies aggregate liability limit. This handling of defense cost is contrary to general custom and practice and is unacceptable for several reasons. It places a burden on the insured to cover costs which he is powerless to control, and which may significantly reduce the aggregate limit of liability. The result would be that the insured may have less coverage remaining than he is aware of, or requires. Litigation defense costs have been traditionally borne by insurers because the defense activities benefit the insurer as much if not more than the insured. Insufficient justification has been presented which would warrant such a major change in insurance practice on this broad scale.

The undersigned is satisfied that the insurance industry has fairly demonstrated a need for a Claims Made form of insurance, specifically in long tail types of commercial coverage. However, the changes which are being required prior to approval of such a policy form within this State are essential if the interests of the public are to be protected. It is clear that the new form of coverage will require considerable effort on the part of both companies and their representatives to ensure that policyholders fully understand the coverage being provided. The inclusion of the requirements set forth above will eliminate unnecessary controversy.

IT IS THEREFORE ORDERED, on the basis of the foregoing, that policy form CG0021185 as filed and as amended to date, together with all endorsements, riders,

forms and manual rules regarding or related to such policy form, are hereby disapproved for use in this State.

YOU ARE FURTHER NOTIFIED THAT:

A. Nothing contained in this Order or Notice of Decision shall be considered or construed as a disapproval of policy form CG 0001-1185 filed and amended, including any endorsements, riders, forms or manual rules filed for use in connection only with such policy form; and

B. The disapproval of policy form CG0021185 and related materials is entered without prejudice to any subsequent refiling by the Insurance Services Office, Inc., or to the submission of any claims made policy form by individual insurers.

Dated at Hartford, Connecticut this 31st day of December, 1985.

/s/ Peter W. Gillies
PETER W. GILLIES
Commissioner

[STATE OF ILLINOIS, DEPARTMENT OF INSURANCE LETTERHEAD]

IN THE MATTER OF:
POLICY FORM FILING NO. GL84-084CP
OF INSURANCE SERVICES OFFICE, INC.
101 N. WACKER DR.
CHICAGO, ILLINOIS 60606

NOTICE OF DECISION

YOU ARE HEREBY NOTIFIED, that pursuant to Sections 143 and 402 of the Illinois Insurance Code (Ill. Rev. Stat. 1983, Ch. 73, pars. 755 and 1014) the undersigned John E. Washburn, Illinois Director of Insurance has conducted a lengthy and complex investigation of policy forms E600011185 and E600021185 filed by Insurance Services Office, Inc. ("ISO") under filing number GL84-084CP on March 7, 1984, as amended through October 28, 1985. As part of the investigation public comment and information was sought at open hearings held on August 28, 1985 in Chicago, Illinois.

Based upon the above-referenced investigation it is determined that ISO's policy form C60021185 ("Claims Made") does not meet the standards for approved use set out in Section 143(2) of the Illinois Insurance Code for the following reasons:

1. ISO's filing of the CGL form is the first wholesale revision of its Commercial General Liability ("CGL") policies since 1966. Prior to this time ISO's CGL policies have always been written on an "occurrence" basis (i.e. claims were covered if the event causing the loss "occurred" during the policy period, regardless of when the claim is made). ISO's new Claims-Made policy covers only those losses which arise during the policy period and for which claims are presented during the policy period.

2. ISO indicates that the Claims-Made policy form is needed for numerous reasons, many of which have substantial merit and relate to case law developments in the field of tort litigation, to wit:

   a. Litigation under the old "occurrences" policy has made realistic underwriting of commercial liability risks impossible. At the time this policy form is sold and priced neither the insurer nor the policyholder can be reasonably certain of the nature or extent of losses which may be determined as within the liability coverage 5, 10, 20 or more years into the future when theories of tort law may be changed.

   b. Legal disputes and rulings over the determination of when an injury "occurs" often cannot be foreseen when the injury itself is latent or results from long-term exposure or both. Thus, it is often impossible to project future losses when pricing an occurrence policy because of the inability to know what legal theories will be used in future years, and in the various jurisdictions, to determine the time of loss under a given policy.

   c. Numerous unforeseen legal theories have been adopted under which a series of events or exposures to risk have been held to have caused a loss which continued over a span of years and numerous "occurrence" policies; leaving many policies, and often several insurers, with an obligation to indemnify to the policy limit of each policy triggered by the continuous "occurrence". This stacking of coverage limits could not have been foreseen in the 1920's or 1930's. Even if it had been foreseen and policies could have been more accurately priced, such prices, taking into account economic inflation and inflation in the level of damage awards, would have been prohibitively high for policyholders.

   d. Under the old "occurrence" policy, many areas of coverage have been held to have only per-occurrence limits of liability and no aggregate limits. This combined with the uncertainties of inflation, tort legal theories, stacking and the fact that premiums are established at the policies inception without an ability to adjust for unforeseen future losses makes underwriting liability coverage extremely risky for the insurance company.

   e. ISO's current CGL coverage forms are extremely complex and burdened by the usage of numerous endorsements and riders needed to shape coverage to the extent which most policyholders desire. To reduce costs and confusion the current forms and manual rules need to be streamlined, clarified and made more understandable.

   f. Because of the difficulty in underwriting the current CGL policy with reasonable accuracy, reinsurers are increasingly opposed to sharing the risk of loss on such lines of coverage. This in turn reduces the direct writing insurer's ability to accept as many policyholders without obtaining large increases in reserves to offset the liabilities no longer accepted by reinsurers.

3. During the course of this investigation numerous concerns were raised regarding the effects which ISO's Claims-Made policy form would have on the market place. No one can dispute that the Claims-Made forms as originally proposed would have provided some temporary relief from the uncertainties suggested by ISO as justifying the new contract. Nevertheless, the standards to be applied under Section 143(2) of the Illinois Insurance Code require the Director to give substantial weight to the impact of a policy form on the intended purchasers.

Of particular significance in this case is the issue of whether or not the policy form "contains exceptions and conditions that will unreasonably or deceptively affect the risks that are purported to be assumed by the policy".

4. Initially, ISO's policy form contained provisions which would have the following purposes or effects:

   a. Retroactive date of policy (indicating date on which policy coverage attaches) could be unilaterally changed by the insurer upon renewal or by a succeeding insurer, if for any reason the policyholder changed carriers, upon the issuance of a new policy.

   b. Claims for losses had to be made within 60 days of the end of the policy period. The company could unilaterally offer to extend the claim reporting period indefinitely for an additional change of no more than 200% of the original premium.

   c. Acceptance of a company's offer of an extended claim reporting period would not have provided any minimum level of aggregate limits coverage. The original aggregate limit of coverage may have been exhausted by claims made before the extended claim reporting period was purchased.

   d. The insured was required to notify the company of any occurrence during the policy period which may give rise to a claim. The company could then, at its discretion, attempt to settle the potential claim, cancel the coverage before a formal written claim was made, or do nothing and hope that no claim was filed.

   e. Upon renewal or replacement of a Claims Made policy with another the insurer not only had the ability to advance the prior policies retroactive date but could also issue exclusions for particular risks known or suspected to have occurred during the prior policy period, but for which no claim had been filed.

   f. An insured whose Claims Made policy was cancelled for non-payment of premium had no right to purchase tail coverage regardless of the reason for the non-payment of premium.

5. Other policy provisions raised concerns regarding clarity and lack of specificity of intent, however those issues are of minor significance when compared to the major changes contained in ISO's initial filing of policy form CG00021185. The changes reflected in paragraph 4 above would totally eliminate a commercial insured's ability to assure himself of full coverage regardless of the price he is willing to pay. The insurers ability to exercise its contract rights to cancel, non-renew, advance retroactive dates, refuse tail coverage, and issue laser endorsements, all on a unilateral basis, would deny policyholders any reasonable expectation that a Claims Made policy purchased today would ultimately provide significant coverage for the risks contemplated.

6. Admittedly, ISO asserts that its members would not abuse their policyholders by the arbitrary or unreasonable exercise of contract rights; and that the use of this policy form would be limited to areas of the market which consists of large commercial insureds with high losses and long indeterminate loss payout periods. It is argued that such consumers are knowledgeable and sophisticated enough to understand the nature and need for these proposed changes. These assertions are hopefully accurate; nevertheless, they give the Director no basis for approving ISO's filing.

7. The new Claims Made form is filed for general use. If the ISO filing were approved it could be lawfully adopted by any ISO member company and sold to any corner grocer, shoe repair store or other small business as well as to the largest corporations in the State. It is also concluded that if ISO can foresee methods by which company contract rights can be reasonably and fairly exercised under the Claims Made form, then such methods can be translated into policy language which would preclude the potential for arbitrary or unreasonable action by insurers. Insurance contracts need not and should not leave policyholders at the mercy of their insurer's good will and unilateral judgment. As witnessed by current market conditions and questionable decisions by some carriers to cancel some risks, it is noted that insurance companies often base corporate decisions upon legal and economic circumstances beyond the control of individual insureds. In many cases the results can be devastating to both the long-term and short-term interests of policyholders. It is recognized that companies have a twofold obligation to treat policyholders fairly and reasonably while at the same time managing their insurance business efficiently so as to maintain adequate reserves and financial stability. While decisions made in fulfilling this latter obligation may be said to benefit policyholders generally it often causes extreme difficulty for individual insureds. Therefore when reviewing policy language it is of the greatest importance that the regulator be assured that all potential policyholders have the opportunity to know exactly what they are buying.

8. ISO, by its various amendments to form filing number GL 84-084CP, has made numerous changes in a good faith effort to eliminate problems disclosed by the current investigation. The most significant changes include alterations to the Claims Made policy as follows:

a. An automatic extended tail coverage for claims made within 5 years of the policy period, and for which notice of occurrence was given during the period from the retroactive date to a date 60 days beyond the end of the policy period.

b. A mandatory offer of an alternative extended tail coverage for claims or occurrences made or reported after the end of the policy period.

c. An option (by the company) to increase the original amount of aggregate limit of liability applicable during the period of extended tail coverage.

d. Limitations on the carrier's right to advance a retroactive date only if:

   i) there is a change in carrier;

   ii) there is a substantial change in the insured's operations causing an increased risk of loss;

   iii) the insured fails to provide the carrier with information which the insured should have known and which was material to the acceptance of the risk or which was requested by the carrier; or

   iv) the insured requests such advancement.

e. Prior to the advance of any retroactive date the insured must acknowledge in writing that all rights to purchase an extended tail have been explained.

f. The company's obligation to provide coverage is triggered when a claim is "received and recorded" either by the insured or the company.

9. With these and other changes ISO made significant progress towards eliminating the deficiencies of the original Claims Made filing. However, several key problems remain and although ISO has indicated a willingness to continue working towards their elimination, policy form number CG00021185 cannot be approved until they are addressed.

10. Although the changes offered by ISO will allow most policyholders to elect extended tail coverage, the election would in all cases be exercised in the absence of any information needed to make the choice. Any policyholder with paid or outstanding claims or notice of occurrences having arisen during the policy period would have reason to believe some portion of his aggregate limit had been used up. He would not know how much remained; and, if he did make a good guess, he would still have no right to any addition to the aggregate limit to cover unknown or unliquidated claims during the extended tail coverage period. The policyholder would thus be asked to decide whether or not he wished to pay up to 200% of his original premium for the extended tail coverage without knowing how much, if any, additional coverage he was actually buying. Nor would he have any basis for pricing such tail coverage or negotiating new policy coverages, exclusions and retroactive dates with either his current carrier or any other insurer in the market place. Such information is essential for a policyholder to be able to effectively market his risk in a competitive environment.

11. The only way in which this deficiency can be corrected is by establishing a minimum aggregate limit of liability available during the extended tail coverage period and requiring that the company give each policyholder the following information:

a. All information on closed claims including the date and description of occurrence, and amount of payments, if any;

b. All information on open claims including date and description of occurrence, amount of payments and amount of reserves, if any; and

c. All information on notices of occurrence including date and description of occurrence and amount of reserves, if any.

12. The absence of such contractual rights to a minimum additional aggregate liability and to receive information upon which the purchase of such additional coverage can be valued leaves the policyholder in a position of ignorance as to the value of the extended tail coverage he is being offered. Such results are in and of themselves a sufficient cause to disapprove the Claims Made policy form. The form's provisions assume that companies will act reasonably and charge minimum premium or no premium for the extended tail coverage, if the remaining available aggregate limits are diminished or exhausted. As indicated above such assumptions are not subject to direct proofs and in particular circumstances they have been shown to be incorrect because of concerns of insurance companies which are often adverse to the interests of individual policyholders. Even if the assumption of reasonable action by insurers could be proven, the policyholder would still be at a marketing disadvantage if he wished to consider switching carriers. Without the underwriting data on claims and reserves, policyholders would not be able to compare the advantages of the tail coverage offered with any offers of a new policy from other carriers.

13. Additional deficiencies exist in the policy form's treatment of cancelled policyholders. The rights of

policyholders to an extended tail coverage if they are cancelled due to non-payment of premium have not been addressed. No justification exists for omitting such rights on the assumption that the policyholder is less deserving. The optional purchase of tail coverage is itself dependent upon the payment of the premium charged and the company therefore would incur no unforeseen or uncompensated liability for providing such rights.

IT IS THEREFORE ORDERED, on the basis of the foregoing, that policy form filing number GL84-084CP filed on March 17, 1985, as amended through October 28, 1985, together with all endorsements, riders, forms and manual rules regarding or related to such policy form filing, are hereby disapproved for use in this State.

YOU ARE FURTHER NOTIFIED that:

A. This Order and Notice of Decision shall be considered and construed as a disapproval of policy form CG00011185 as well as policy form CG00021185. Although the "occurrence" format of policy form CG00011185 is generally acceptable, it was filed with the Claims Made policy form and the manual rules and endorsements used on each policy assume the existence of both forms and the policies must therefore be considered jointly.

B. The disapproval of policy form filing number GL84-084CP is entered without prejudice to any subsequent refiling by the Insurance Services Office, Inc., or to the submission of any occurrence or claims made policy form by individual insurers. Any such refiling or filings shall be considered independently under the applicable insurance laws.

IN WITNESS WHEREOF, I have hereunto affixed the Official Seal of the Department of Insurance in the

City of Springfield, State of Illinois, this 30th day of December A.D., 1985.

s John E. Washburn
JOHN E WASHBURN
Director of Insurance

[STATE OF ILLINOIS,
DEPARTMENT OF INSURANCE LETTERHEAD]

January 27, 1986

Daniel J. McNamara
President
Insurance Services Office, Inc.
175 Water Street
New York, New York 10038

Dear Mr. McNamara:

As you are aware, policy form filing number GL84-084CP filed on March 7, 1984, as amended through October 28, 1985, was disapproved by this office on December 30, 1985. That disapproval was issued primarily because of three deficiencies in policy form CG00021185 (the "Claims Made policy"), inter alia:

1. The Claims Made policy did not give the insured a right to purchase supplemental extended reporting period coverage ("tail" coverage) if the policy were cancelled for non-payment of premium;

2. The provisions of the Claims Made policy did not assure that if the supplemental tail coverage were purchased, the insured would actually receive any additional coverage, since his policy's aggregate limit of liability may have already been obligated; and

3. The Claims Made policy did not entitle the insured to receive the loss information he would need to obtain competitive quotes or to determine the need for purchasing supplemental tail coverage.

These deficiencies were found to be reasonable grounds for disapproving the policy form filing because of their impact on insureds. Without the correction of these deficiencies a policyholder could expect to incur gaps in coverage and would be forced to make purchases of supplemental and replacement coverages without knowing what he was buying, whether it would meet his needs or whether the price was reasonable.

On January 16, 1986, policy form filing GL84-084CP was refiled with amendments which correct the foregoing deficiencies in policy form CG00021185. Insureds who are cancelled or nonrenewed for *any* reason are given the right to purchase supplemental tail coverage. When supplemental tail coverage is purchased insureds are guaranteed reinstatement of 100% of the aggregate limit of liability under the policy for all claims reported after the end of the policy period such that purchasers know exactly what their payment of additional premium will provide them. Finally, there is a right of the policyholder to obtain such loss information on claims and occurrences as may be necessary to obtain replacement coverage should he change insurance companies for any reason.

Under the new Claims Made policy insureds will be entitled to receive loss information in whatever form the market place requires. If insurers require aggregate loss data to quote a risk previously writen on a Claims Made policy, then the insured will be entitled to the data in that form from the existing carrier. If insurers require loss data itemized by specific claims and occurrences, then insureds will be given the data in that form.

With the current amendments companies obtain the ability to assure themselves of a limit to their liability and to charge a premium payment which more accurately reflects the loss experience of a given risk. In exchange, insureds obtain the ability to make rational choices in the purchase of liability insurance. Every claims made policyholder will have the information necessary to determine, and the right to determine whether he needs supplemental tail coverage, higher aggregate limits of liability, or whether he can get adequate coverage elsewhere at a better price.

This new policy form filing presents a new approach at a time when the market place is in desperate need of a tool to break the intolerable boom and bust cycle which has dominated liability markets for decades. Companies will gain from the greater certainty which this policy brings. At the same time, liability insurance purchases will no longer be simple "take it or leave it" propositions because of the unprecedented access to loss information on claims and occurrences. For these reasons policy form filing no. GL84-084CP is hereby approved as filed and amended January 16, 1986.

Very truly yours,

JOHN E. WASHBURN
Director of Insurance

JEW:mai

CC: Richard Rogers

[EXHIBIT R]

[INSURANCE SERVICES OFFICE, INC. LETTERHEAD]

June 18, 1986

LETTER TO CHIEF EXECUTIVES

Gentlemen:

Advisory Excess and Umbrella Language
For Use With The CGL Policy

The introduction of ISO's revised Commercial General Liability (CGL) Program—particularly the "claims-made" form—has placed substantive demands on the excess and umbrella markets to develop compatible forms for higher layers of coverage. The industry-wide controversy surrounding the CGL Program, while now beginning to abate, spawned confusion and uncertainty as necessary modifications were introduced to accommodate the needs and concerns of all interests. Clearly, no single approach or policy form can serve the diverse, independent, and worldwide marketplace in providing excess and umbrella coverage over an underlying program that is itself inherently flexible.

Nevertheless, ISO staff has developed—*without insurer committee participation*—umbrella policy language which can be adapted in various ways to fit over primary insurance written on ISO's 1986 Commercial General Liability policy forms. We are providing our advisory policy language to you for your information and possible use, along with an explanation of various provisions and how they can be assembled. Of course, the application of a company's own independent underwriting and legal judgment is essential to the proper use of this material.

The alternative provisions can be combined into a policy providing "excess liability" coverage only, "extended liability" coverage only, or "umbrella" coverage which is a combination of both. The "excess liability" coverage utilizes a "follow form" approach over scheduled underlying

insurance. These provisions can be used with either the "claims-made" or occurrence versions of the CGL policy. The "extended liability" coverage applies to exposures not ordinarily covered by underlying policies or specifically excluded in them. Coverage for these exposures is on a "claims-made" basis. An umbrella policy is formed by using both the excess and extended liability coverages.

To further enhance policy flexibility, certain provisions have been drafted in more than one version, and several endorsements are also included. *Beyond this unique distribution in response to unprecedented circumstances, ISO will maintain its traditional role of non-involvement in the excess-umbrella field.* ISO does not recommend that insurers assemble this language into any particular policy form, and each insurer must carefully analyze coverage and policy language on a risk-by-risk basis. Furthermore, ISO's providing this language is not meant to suggest that other language could not be more appropriate for some or all risks. ISO does *not* intend to file or advocate the enclosed policy language with any insurance department, nor to support it with statistical, rating, rules, or other services.

Copies of your advisory material are being sent simultaneously to other key domestic and international industry interests, also for the same informational purposes.

Sincerely

s Daniel J. McNamara
DANIEL J. MCNAMARA
President

cc: ISO Board of Directors
ISO Commercial Lines Committee
ISO General Liability Committee

[EXHIBIT S]

[STATE OF ILLINOIS,
DEPARTMENT OF INSURANCE LETTERHEAD]

February 28, 1985

Insurance Service Office
101 North Wacker Drive
Chicago, Illinois 60606

Attention: Mr. Roger Steinback
Regional Manager

Dear Mr. Steinback:

Pursuant to our recent telephone conversation regarding the recent amendments to the Commercial General Liability Policy Program, the following is a brief summary of some of our concerns regarding this program.

1. Education. Concepts so divergent as to impact the entire marketplace, and each and every individual insured, should be accompanied by education in order to achieve acceptability. Certainly, an effective date aimed at January of 1986 is questionable to allow sufficient time as to accomplish a comprehensive educational program, comprehensive enough to educate individual consumers in order for them to make a reasonable decision with regards to the best product to suit their situation. What steps, if any, has ISO and the insurance industry taken to educate the industry personnel, sales force and consumers on the concepts and differences in products they will now be offering, in order for the insured to make a reasonable decision regarding their specific needs?

2. The new occurrence policy form, as well as the new claims made policy form, now propose an aggregate limit to the various coverage sections. While aggregate limits are not a new concept in insurance contracts, it will certainly be a new concept to a majority of insureds who now have set liability limits

applicable to each and every covered occurrence. Presently, aggregate limits are generally confined to very large commercial risks and professional liability type policies and the aggregate limit is reduced during the policy term by a proportionate amount of the claims paid during such policy period. Since this concept will be new to the majority of general liability insureds, we feel the following questions should be addressed:

A. What steps, if any, have been taken or are proposed to be taken, by ISO and the insurance industry to keep the insured informed of his liability limit as claims are paid and the aggregate limit decreases?

B. As claims are paid and the aggregate policy limit decreases, will the insured be able to repurchase new limits or increase his/her limits during the policy period?

C. Will the Excess and Umbrella policy forms be changed accordingly? Presently, Excess and Umbrella policy forms require not only that the insured obtain primary coverage of certain limits but also require that the insured maintain such primary coverage limits during the term of the policy. Unless the Excess and Umbrella policies are changed accordingly, it is conceivable that there may be gaps or voidance of coverage.

3. Notification of an event that may result in a claim. Under the Conditions Section of the claims made policy, the insured is required to notify the insurer or an occurrence which may give rise to claim being made under the policy. The triggering mechanism for coverage, however, is written notice to the insured or the insurance company of such claim from the person or organization seeking damages, providing such written notice is furnished during the policy period.

A. If the triggering mechanism for coverage is written notice to the insured, why is there a need under the conditions section for the insured to notify the insurer of an occurrence which may give rise to a claim being made under the policy?

B. If an insured notifies the insurer of an occurrence which may give rise to a substantial claim, what prevents the insurer from cancelling or non-renewing the policy in an attempt to avoid a claim under the policy? Granted the insured can purchase extended discovery period coverage at a maximum premium of 200% of the final annual premium, but he or she also faces obtaining a new policy at current manual rates and rating plans.

C. If an insurer is notified of an occurrence which may result in a claim, and does absolutely nothing to investigate and resolve, the potential for claim would seem contrary to the Improper Claims Practices Act of Illinois and other jurisdictions.

D. If the insurer intends to use the mechanism to investigate and settle certain claims and wait for the trigger mechanism on other claims, this certainly reeks of unfair discrimination in claims handling.

4. Under Section IV., this insurance is excess over any other insurance including excess. Excess policies generally contain similar wording in their Other Insurance Clauses. How do you propose this conflicting wording be resolved without legal action being taken by the insured to resolve?

5. On the claims made policy, the medical payments coverage is written on an occurrence basis. Why?

6. Under the Extended Reporting Period Option, only the first named insured may exercise the option. We feel any named insured should be able to exercise this option.

7. The cancellation provision conflicts with Illinois Statutes which requires written notice of cancellation to the named insured, not the first named insured.

8. With the revision to the Extended Reporting Period Option, shouldn't Endorsement GL 2701 11/85, which limits the availability of the extended reporting option to retirement, out of business and cancellation by the company, be withdrawn since it conflicts with the revision.

The above illustrates only some of our concerns that we would like to discuss and should not be construed as being all encompassing.

Please feel free to contact me to arange a meeting to discuss this matter.

Very truly yours,

/s/ Robert F. Heisler
ROBERT F. HEISLER
Assistant Deputy Director

RFH:mbc

[STATE OF NEBRASKA,
DEPARTMENT OF INSURANCE LETTERHEAD]

Rudy D. Broyles
Regional Manager
Insurance Services Office, Inc.
12 South 6th Street
Minneapolis, MN 55402

RE: GL 84-084CP CGL Policies

Dear Mr. Broyles:

We have analyzed the aforementioned filing and have the following comments/questions:

1. Although we are aware that you wish to file the forms first and the rates later, we are very concerned as to how the rates will be generated for the claims made policy. Given the nature of the claims made policy, it is difficult to analyze the form without the accompanying rates when the rates are such a crucial part of the claims made format.

2. With regard to the sudden and accidental polution exclusion in (Section I 1a and 1b on Coverage A), the change in the sudden and accidental polution exclusion would seem to be a significant reduction in coverage relative to the old form. Would you please comment on this reduction and whether or not it will promote gaps in coverage?

3. Under Coverage B, Personal and Advertising Injury, these coverages are apparently on an occurrence basis while contained within a claims made form. It has been Nebraska's policy that claims made and occurrence not be written in the same form or package because of the resulting confusion in coverage and potential gaps in coverage.

4. With regard to the "notice of occurrence which is not notice of claim", we are concerned that there could be gaps in coverage if oral and/or written notice of a potential claim is made during the policy period and/or written notice is given but no claim is made until the succeeding policy period. Given the typical application on a claims made whereby claims resulting from known prior acts and/or knowledge is excluded or the policy is not even issued, the insured could be left with no coverage.

5. Before we can proceed, we do need the charge for the extended reporting period. Since this is a claims made policy, if the insured does not know the cost of the extended reporting period, all the insurer has to do is to charge an exorbant rate. Since obviously the problem exposures will be the ones that wish to have an extended period, the insured could be left with no tail coverage.

5. Could you please file the application since it would be such an intergal part of this type of coverage?

6. Could you please further explain the exclusion under Property Damage (Item J on page 2 of 9)? Since it appears to go much farther than the standard property damage exclusion of care, custody and control? Could you also further clarify the intent of the following paragraph: ("paragraph (2) of this exclusion. . . held for rental by you") which follows j.(6).

7. Given the common general usage of a CGL occurrence policy, do you anticipate any problems with the availability of excess umbrella, etc. coverage? All of the excess programs above this level have been occurrence because of the fact that claims made underlying policies have never been used in this area. Given the two different coverages and

the differences in the manner in which coverage is triggered, we are concerned about both the availability of umbrella, excess, etc. coverage, and also the concurrency of the coverage.

8. We do have serious concerns with respect to the use of claims-made policies by non-speciality and small to medium sized insureds who do not have the expertise and experience with the claims-made policies. The above scenario coupled with the relative non-specialized insurance knowledge of the typical general liability insured could cause a large amount of confusion resulting in misunderstandings and gaps in coverage. Could you please elaborate on the proposed educational programs involved at the insurer, agent, and insured levels? Also will the claims-made policy be significantly marked or indicated such so the insured clearly realizes the product he has purchased is not the occurrence policy he is used to? What procedure will be used upon cancellation, nonrenewal, etc., to notify the insured that an extended period is available and procedures (including that time limitation, etc.) to obtain that option?

Further action on this filing will await your reply.

Very truly yours,

/s/ Daniel E. Eckstein
DANIEL E. ECKSTEIN
Property/Casualty Analyst

DEE:jr

[STATE OF NEW YORK INSURANCE DEPARTMENT LETTERHEAD]

October 11, 1985

NEW YORK STATE INSURANCE DEPARTMENT OPINION AND DECISION ON SIGNIFICANT ISSUES RAISED BY INSURANCE SERVICES OFFICE, INC. FILING ON COMMERCIAL GENERAL LIABILITY CLAIMS-MADE POLICY FORM

The Insurance Services Office Inc. (ISO) filed a revised Commercial General Liability (CGL) Program with the New York State Insurance Department (Department) on March 13, 1984, with subsequent amendments to such Program filed on December 5, 1984 and February 14, 1985. The CGL filing represents the first major revision for this product since 1966. The filing attempts to accomplish three major objectives:

(1) Consolidation, streamlining, and simplification of the existing CGL policy;

(2) Elimination of some areas of uncertainty under current occurrence forms brought about by adverse court decisions in several jurisdictions;

(3) Virtual elimination of coverage for an arguably uninsurable exposure, namely, pollution.

ISO has also filed numerous endorsements to complement the CGL policy forms. ISO filing GL-84-084CP consists of a revised CGL policy in two versions. The two versions differ only with respect to their coverage trigger and related provisions. The occurrence version, GL0001, provides bodily injury and property damage liability coverage for injury or damage that occurs during the policy period. The "claims-made" version, GL0002, provides bodily injury and property damage liability coverage only when a claim for damages is made during the policy period.

This filing has evoked much controversy in the commercial liability insurance marketplace, with three principal areas of controversy dominating the debate on the revised CGL policy forms. These are:

(1) A substitution of a claims-made approach for an occurrence as the trigger of coverage under the policy;

(2) An aggregate annual limit of coverage for all coverages under the policy; and

(3) An exclusion of coverage for sudden and accidental pollution.

The above changes are deemed by ISO and several major insurers and reinsurers to be absolutely essential to the reestablishment and maintenance of healthy primary and reinsurance markets for general liability insurance. ISO has also stated that if state regulators tie insurers' hands by not approving the above coverage changes, some insurers will withdraw from the marketplace or become insolvent, while others may have to curtail their operations in the general liability line of insurance. Purchasers of CGL insurance such as the Risk and Insurance Management Society, insurance producers, and various consumer representatives have expressed great concern over the proposed changes, contending that such changes will result in misunderstanding on the part of insureds, gaps in coverage, and an abrogation by the insurance industry of its traditional role of reducing uncertainty for insureds.

In view of the extreme importance of this filing, the Department has solicited the views of all parties concerned with the commercial liability insurance product. The filing was the subject of a Public Hearing held at the Department on May 16, 1985 and many meetings with ISO and other concerned parties. A Joint Forum on the filing, sponsored by the Illinois, New York and Texas Insurance Departments, took place on July 25, 1985 in Chicago, Illinois.

This opinion and decision will concern the three controversial elements of ISO's CGL filing. While the Department is still reviewing some of the numerous other revisions being proposed in the CGL form, on the whole, ISO is to be complimented on its effort to consolidate, streamline and simplify the existing CGL form.

OPINION AND DECISION

A need does exist to reduce an insurer's potential exposure caused by adverse and often contradictory court decisions, to enable insurers to better predict their potential loss exposure in order that the pricing of their product may be based on reasonable loss expectations. All three of the above significant changes would result in more certainty in the pricing of commercial liability insurance. The Department is of the opinion that approval of the aggregate annual limit and the pollution exclusion will substantially and sufficiently ameliorate the predictability problems insurers are currently confronting.

The Department does not agree that the claims-made policy form offers a long-term solution to uncertainty problems caused by adverse and/or contradictory court decisions and is of the opinion that such form should only be utilized on risks involving long-tail or latent injury exposures where there is a determined availability problem. Claims-made coverage, as will be demonstrated below, is generally inferior to occurrence coverage and in our opinion, the widespread use of the claims-made policy is inappropriate and unnecessary on most exposures. ISO and several major insurers have agreed that a problem exists on only about 5% of the CGL policies written. A better effort should be made by industry to both isolate such problem exposures and draft policy language that restricts coverage to the contemplated exposure.

The Department has, for many years, approved claims-made policy forms for the following exposures:

—Professional Liability, including (since 1981) Medical Malpractice
—Errors and Omissions
—Employee Benefit Liability
—Product Liability
—Completed Operations
—Pollution Liability
—Environmental Impairment

All of the above have either long-tail or latent injury characteristics. Additional exposures may be added to the above list by the Department upon a demonstration of need by any interested party.

All claims-made policy forms previously approved or to be approved in the future will be required to meet specified minimum standards, as set forth in a regulation to be promulgated by the Department. Such minimum standards should include:

(1) An extended claim reporting period (tail) of unlimited duration must be offered for sixty days subsequent to the cancellation of the policy at a premium not to exceed 200% of the current mature claims-made liability policy annual premium. This provision shall also apply to cancellations for non-payment of premium, if a claims-made policy has been in effect for one year or longer.

(2) A free sixty day extended reporting period (tail) shall be provided upon cancellation of the policy by either the insured or insurer at no additional charge at that time.

(3) If a claims-made policy has been in effect for more than two years, tail coverage must be made available at limits equal to at least 100% of the highest aggregate annual limit previously purchased during any claims-made policy period. Thus, the tail coverage may not be limited to the

remaining coverage available during an insured's last policy year.

(4) Endorsements restricting the availability of tail coverage are prohibited. Included as a part of ISO's filing are so called "Laser" endorsements which limit the tail guarantee of the claims-made forms. ISO has agreed to withdraw these Laser endorsements.

(5) Upon termination of a claims-made policy, the insurer must advise the insured of the availability of and premium for tail coverage, and the importance of purchasing tail coverage. In order to make certain that this notice has been received, the terminating insurer should be required to obtain a written rejection of tail coverage from the insured when such coverage is not purchased. If such rejection is not received, the insurer should issue a tail policy to such insured. Non-payment of the premium for such tail policy, resulting in cancellation by the insurer, will be presumptive proof of the insured's rejection of the tail. An alternative to the above procedure would be to place the obligation for obtaining proof of either purchase or rejection of tail coverage on the new insurer. If such proof is not received the new insurer would be responsible for nose coverage back to the original claims-made policy effective date.

(6) An insured must receive at least sixty days notice from the insurer of the cancellation or non-renewal of a claims-made policy other than for non-payment of premium.

(7) The annual premium during the first few years of a claims-made policy should not exceed the applicable occurrence rate for such risk.

(8) An insurer should not be permitted to unilaterally move up an insured's retroactive date (nose coverage) as a condition of policy renewal. An insured may consent to moving up such date in consideration of an appropriate premium saving.

(9) An insured should not be required to report any incident which may result in a claim for which claim such insured might not be covered under the policy. A claim shall be deemed made under the policy if written notice of the claim is received by the insured or insurer from a claimant, or the insured submits written notice to an insurer of an incident which might be expected to be the basis of a claim within the policy period.

(10) The policy application and the initial page of each claims-made policy must have printed thereon in bold face type a notice that the policy is written on a claims-made basis.

(11) An insurer must obtain a signed statement from each new claims-made insured on which the insured acknowledges having been informed of the limited scope of coverage provided by the claims-made form.

The above suggested minimum requirements for a claims-made policy are intended to respond to the serious concerns that the Department has regarding the expanded use of the claims-made form. For the reasons contained in this opinion, the Department hereby disapproves the claims-made version of the revised ISO CGL policy, form number GL0002 and related endorsements. After the Department's Regulation for claims-made policies is in place, claims-made filings may be made on exposures with determined availability problems caused by long-tail or latent injury concerns. The Department will approve the two other controversial parts of ISO's filing, namely, the annual aggregate limit and the pollution exclusion.

JUSTIFICATION PRESENTED BY ISO FOR APPROVAL OF THE CGL POLICY

The CGL filing represents the first major revision for this line of insurance since 1966. The filing has several objectives which are best summarized by setting forth ISO's own stated reasons for the change:

(1) Litigation relating to the existing "occurrence" policy has been costly and time-consuming. For the most part such litigation—which continues to go on to the detriment of insurers and policyholders—has centered on latent bodily injury and long-term exposure issues involving substances such as asbestos and DES. A key issue in dispute is: When did the injury or damage occur? That is extremely important in the context of insurance because the answer determines which "occurrence" policy or policies apply. Litigation over that question is likely to affect more and more insureds of all sizes in all types of business, as new cases arise where the time when bodily injury or property damage occurred is at issue.

(2) Many insureds have to rely on policy limits provided by old "occurrence" policies to respond to current claims, because the injury or damage may have occurred long before the claim is made. Those old policies may have been purchased many, many years before claims emerge, settlements are reached and judgments rendered—and years before inflation eroded the value of the old policies' limits.

(3) Some courts have adopted legal theories in latent-injury or long-term exposure cases, which hold that injury occurred during a long series of "occurrence" policies. That leaves many contracts—and sometimes many insurers—with primary defense and indemnity obligations for a

single claim. Often, such situations arise when there are many claims for similar or related injury. As a result, insurers don't know how much is at stake, and for how long, under these contracts. That makes it difficult to determine accurate premiums and loss reserves. And beyond that, such "stacking" of limits poses a serious threat to the very solvency of some insurers. In view of this, some insurers and reinsurers have become increasingly reluctant to handle "occurrence" coverage. Without some change, there could be a real insurance-availability problem.

(4) Under the existing policy form, the only limit that applies to some parts of the coverage is a per-occurrence limit, so the insurer's liability for injury that occurs during the policy period increases with the number of "occurrences" held to have produced the injury. That liability could be astronomical, depending on how courts interpret the term "occurrence." "Stacking" per-occurrence limits within a single policy further threatens insurance availability and insurer solvency. For example, the drinking of contaminated water over a ten year period could be interpreted as 365 occurrences during a policy year with 365 separate occurrence limits applicable to any claim for injury as a result of such contamination. (The existing policy form does, however, put aggregate limits on many parts of the coverage, including products and completed operations.)

(5) Some courts—after long and costly lawsuits—have interpreted the "sudden and accidental" exception in the existing policy form pollution exclusion so broadly that insurers and reinsurers are exposed to unknown but potentially gigantic losses totally unforeseen when existing policies

were written or priced. Moreover, pollution coverage is particularly vulnerable to all the "occurrence" issues arising under the existing policy form, because pollution-related damage or injury is often latent, there can be many causes of the injury, and there may be no aggregate limits on the coverage.

(6) Need exists to consolidate and modernize ISO's advisory commercial general liability policy forms. Today many forms are needed to provide the scope of coverage that most buyers consider standard.

(7) To improve efficiency and reduce costs, the existing policy forms, manual rules and rating procedures need to be streamlined and made more adaptable to automated policywriting.

(8) Insurance buyers and regulators want more readable and understandable insurance contracts for all lines of insurance.

ISO and various major property and casualty insurers have also stated that immediate approval of the revised form is necessary to alleviate the capacity crunch that now exists in the insurance marketplace. ISO has further represented that utilization of the claims-made form, coupled with an aggregate annual limit and the pollution exclusion, will increase the availability of general liability insurance and will ease insurers' acquisition of required reinsurance.

In the Department's opinion, this decision will meet most if not all of the objectives cited by ISO without the need for the widespread use of the claims-made CGL policy. The exclusion for pollution coverage in the CGL occurrence policy and the availability of claims-made forms for products liability, completed operations, environmental liability and pollution liability will serve to reduce litigation involving latent bodily injury and long term exposure issues involving such substances as asbestos and DES. Most litigation that has extended liability beyond what insurers expected has involved either products or pollution exposures. ISO objectives one and five above appear to be satisfied by the Department's decision. The approval of the annual aggregate limit as a part of the ISO CGL occurrence policy appears to mitigate the concerns raised by ISO objectives three and four above. Objectives six, seven and eight will be met by the approval of ISO's CGL occurrence form. The widespread use of claims-made forms would assist in better meeting objective two, although such form would not wholly solve the problem.

Since the tail of a terminated claims-made policy is restricted to the coverage limits contained in the last year of such policy, any claims that are made several years after such termination would suffer from the eroded value of the tail's limits.

JUSTIFICATION FOR DEPARTMENT'S OPINION AND DECISION

The Department's decision requires a determination as to whether the approval of ISO's revised CGL claims-made policy meets the statutory requirements contained in Section 2307(b) of the Insurance Law. The Department is of the opinion that the claims-made policy form does not meet these requirements in that (a) it would be misleading to insureds and the public, and (b) its widespread use in the standard CGL policy form would be violative of public policy. The virtual exclusion of coverage for pollution losses and the aggregate annual limit, both of which represent severe restrictions of coverage, are not misleading provisions and appear to be necessary to maintain a viable general liability insurance market in New York. The detailed analysis of the reasons for the above decision follows:

Claims-Made Policy Form

Insurers, reinsurers and ISO have testified that the claims-made policy form is not an inferior product when compared to the occurrence form. They cite as benefits to insureds such intangibles as greater availability of coverage and the very solvency of insurers. Also, they state that the claims-made form will facilitate more up-to-date coverage on risks with long tail or latent injury exposures. Finally, insurers argue that insureds receive an initial price reduction with the claims-made form since the purchase of coverage for Incurred But Not Reported (IBNR) claims is deferred to the future.

Since the claims-made premium in a few years equals the occurrence premium, with a possible 200% additional premium needed to buy out of the contract at the end of this period, savings to insureds are temporary and somewhat illusory. Like the popular adage, "Pay me now or pay me later", under claims-made the initial savings are paid for several years down the road at inflated dollar rates. Insureds with latent injury or long-tail exposures, such as products and environmental liability, will be able to purchase a separate claims-made form to cover these exposures. Thus, the objective that claims-made forms provide more current coverage for latent injury claims can be satisfied without having a CGL form on a claims-made basis.

It is clear from the testimony at the public hearing previously referred to that the claims-made form is less readily understood by insureds and the public, and that the likelihood of coverage gaps is much greater under this form. An insured will have less flexibility of movement to another insurer, and an insured with newly discovered claim hazards will face possible bankruptcy as such insured's current insurer will undoubtedly cancel the contract, leaving the insured with inadequate tail coverage to provide for many years of earlier exposure to the newly discovered hazard.

From the perspective of insurers and reinsurers the claims-made policy is clearly a superior product to the occurrence form. Insurers gain greater underwriting control, more certainly in predicting glosses and greater control over insureds due to less flexibility of movement of insureds to another insurer. ISO argues in its publication "ISO Makes the Case for the CGL", that "an overwhelming majority of insurers view their own interests to be in the establishment of an orderly, reliable market for claims-made coverage and will act accordingly". The reliability of this statement is severely tested by the current behavior of insurers in the commercial liability insurance marketplace where, regardless of the underlying policy form (occurrence or claims-made), insurers have been terminating entire lines of business, imposing massive rate increases or placing severe limitations on coverage as a condition of renewal. ISO's often repeated statement that insurers will use the claims-made form in a responsible, orderly manner appears to be out of step with reality.

The Department's regulatory responsibility in determining the acceptance of any new insurance product must clearly reflect the effects such policy has on the purchasers of insurance and the public. We cannot be distracted from this responsibility by threats of industry withdrawal if regulators do not act in the manner requested by industry. If the gloomy forecasts of insurers, reinsurers and ISO come to pass, such problems can be resolved by State action to create alternative markets.

A comparison of the claims-made form with the occurrence form requires the conclusion that the claims-made form is clearly an inferior insurance product from the standpoint of the insured and potential third party claimants. Proponents of the claims-made form state that such form eliminates some uncertainty in writing CGL business, thereby increasing the willingness of insurers and reinsurers to write new business. The uncertainty does not really disappear, however, as the risk is merely transferred from insurers to insureds and the public.

The Department has carefully considered the potential benefits to insurers, reinsurers and producers against the potential costs of the new policy form to insureds and the public. The result of this cost/benefit analysis is a finding that the costs to insureds and the public far outweigh the short-term benefits the claims-made policy provides to the insurance industry. We believe that the elimination of pollution coverage from the standard CGL policy and the new aggregate annual limit of coverage under the policy will eliminate much of the uncertainty caused by recent adverse court decisions. These changes, coupled with a restoration of proper pricing of insurance products in the marketplace (which may be the real cause of most of the industry's problems in insuring liability coverages), should restore sufficient availability for needed insurance products. An effort should be made by all parties at interest to provide a workable definition of occurrence that will reflect the exposure contemplated for the premium charged. The Department stands ready to assist the industry in drafting policy language or legislation that will rationalize inconsistent court decisions.

The following are the principal bases for the Department's disapproval of the general use of ISO's claims-made CGL policy form:

(1) The problems which the claims-made approach is intended to cure are present in only about 5% or less of CGL risks. Instead of imposing claims-made policies on all insureds, regardless of the nature of the risks to which they are exposed, a better approach would be to identify these problem exposures and permit a claims-made approach for them. As mentioned above, the Department has approved claims-made forms for many long-tail and latent injury exposures.

(2) The claims-made policy, in return for an initial reduction in premium, reduces coverage under the CGL policy to claims-made during the policy

period as opposed to coverage for all occurrences during the policy period regardless of when the claim is made. The claims-made form is inherently different from any form of insurance coverage the insured is likely to be familiar with, and the insured's perception of the coverage is, therefore, likely to be colored by such previous experience. Thus, the reduction in coverage will not be readily apparent to insureds, and gaps in coverage are likely. Some insureds will fail to purchase adequate tail coverage and will be confused over the need to coordinate the retroactive date (nose coverage) to the initial date of claims-made coverage. Many insureds will be under the impression that they have received another bargain from their insurer as has been the case in recent years of cashflow underwriting.

(3) Under the claims-made form, insurers are transferring uncertainty and risk from themselves to insureds, to the detriment of both insureds and the public. Insurers are in the risk business. As the sellers of certainty and reduction of risk, their advocacy of the claims-made form appears to be contradictory to the very purpose of their existence. As risk insurance managers testified at the Department's September hearing, insurance purchasers would pay a higher price for a product that covers their needs rather than be forced to buy an inferior product. It is apparent from the plans of several insurers that, should the form be approved, only claims-made CGL policies will be available in the marketplace. Reinsurers will pressure other insurers to write underlying coverages on a claims-made basis if such an option is available. This refutes ISO's representation that the claims-made CGL form will be merely a companion product to the

occurrence form in the marketplace. Approval of a claims-made CGL form may be the precursor of claims-made Business Auto Policies (BAP) and Business Owner's Policies (BOP).

(4) Although proponents contend that the claims-made approach will reduce costly litigation, that contention seems suspect. First, the term "occurrence" would continue to be used in the claims-made form. Yet it would seem both desirable and doable to replace or redefine the term "occurrence" contractually and, if necessary, legislatively. Moreover, given the difficulties producers would face in attempting to explain the complexities of the claims-made policy to insureds, the coverage litigation that insurers are currently experiencing might simply shift to a proliferation of errors and omissions lawsuits against producers.

(5) Although insurers urge that the occurrence policy approach be totally discarded for commercial coverages, the stacking dilemma they confront might be more effectively addressed by an appropriate coordination of benefits strategy.

(6) Two other critical issues are (a) whether, when occurrence and claims-made approaches are compared, the reduction in premiums will be commensurate with the reduction in coverage, and (b) how premiums will step up as claims-made policies age. Criteria must be developed to ensure proportionality between premiums and protection.

(7) Adding tail (or nose) coverage on a claims-made policy raises many issues, such as whether commercial insureds (upon retirement, bankruptcy or insurer changeover) will have sufficient ability, incentive, or wherewithal to purchase it. On the one hand, the possibilities of collusion and

adverse selection appear to be accentuated to the detriment of insurers; on the other hand, insurers will be inclined to carve out known exposures from tail coverage through Lazer endorsements, or otherwise, to the great detriment of insureds. ISO has filed endorsements that will permit insurers to eliminate coverages for known occurrences which will result in insureds being forced to purchase partial tail coverage for exposures no longer covered and to seek another insurer for the future.

(8) The freedom of an insured to shift its business to another insurer will be more restricted as such transfer will necessitate the purchase of a tail from the current insurer or nose coverage from the new insurer at a rate up to 200% of the current year's premium plus payment of a full year's premium to the new insurer.

(9) An insured who inadvertently overlooks the due date of a premium notice and is subsequently cancelled will not be able to purchase tail coverage. An insurer with several years' potential exposure to tail losses can escape its responsibility by this momentary oversight of the insured. Additionally, few insurers, if any, would write an insured with a retroactive date to cover these prior periods, leaving the cancelled insured with a huge gap in coverage. Under the occurrence form, the insured's potential gap in coverage is limited to the short period of the lapse in the policy.

(10) While the ISO policy does guarantee the purchase of a tail at a maximum 200% premium, such tail coverage is restricted to the remainder of any aggregate limit of coverage left at the end of the last year of the policy before expiration. Thus, an insured with many claims during

this last year (which could be the reason for the insurer's termination) might not have any meaningful coverage available under the tail. Insurers should offer an adequate percentage of the last year's annual aggregate limit as tail coverage, dependent upon the length of time the claims-made policy was in effect. ISO's form must be revised to increase the amount of coverage required to be offered under the tail policy. The claims-made Regulation to be promulgated by the Department contemplates an offer of tail coverage at least equal to a new aggregate limit if the claims-made form was in effect for more than two years.

(11) ISO has stated that the claims-made policy benefits insureds and potential third party claimants by offering coverage limits which can be increased year by year so that they may more closely approximate the dollar value of claims at the settlement date. Thus, in latent injury cases where the actual injury occurred many years ago but the manifestation of the injury occurs today, coverage for such claims can respond in 1985 dollars, if the insured has chosen to increase claims-made coverage limits. Under an occurrence policy, the limits purchased at the time of the original occurrence would still be applicable. However, the same objection raised to the occurrence form, that is, that it provides inadequate coverage for claims reported in the future, would be equally applicable to tail coverage in that such coverage may not exceed the limits of the terminated claims-made form even though claims under the tail coverage may not be reported until many years in the future.

(12) The difficulties encountered in calculating the premium under an occurrence form, because of

the uncertainties of unreported claims, would be equally applicable in calculating the premium for the tail coverage.

(13) The dual existence of both claims-made and occurrence forms for similar coverage creates a myriad of problems when attempts are made to reconcile reinsurance treaties and umbrella policies, for example, an umbrella policy issued on an occurrence basis when some of the required underlying coverage has been purchased on a claims-made basis. Rules must be developed to reconcile such coverage problems.

(14) The ISO claims-made CGL policy requires insureds to notify an insurer promptly of an occurrence which may result in a claim, but restricts coverage to claims made in writing against an insured during the policy period. Thus, an insured is placed in the difficult position of reporting an event for which coverage might not be adequate. There exists a real possibility of collusion between the insured and third party claimants to delay the making of a claim until limits can be increased on policy renewal. Conversely, should the insured report the incident, it is possible that the insurer might decrease coverage on renewal, cancel the policy, or raise the premiums. Disputes involving the date when a claim is reported are bound to result in increased litigation. Some of this litigation can be eliminated by triggering coverage to the reporting of an incident which may result in a claim.

(15) Potential third party claimants are not granted the same level of coverage availability under claims-made forms as currently exists under occurrence policies. Under an occurrence form, a third party claimant has access to an insured's

policy for any occurrence during the policy period regardless of when the claim is made. Under a claims-made form, should an insured leave the business or become insolvent or bankrupt, it is quite possible that such insured will not purchase tail coverage, thus leaving claimants without a source of recovery. It is generally acknowledged that the great majority of new businesses fail during their first five years. Section 3420 (a) (1) of the Insurance Law requires every liability policy issued in this state to contain "a provision that the insolvency or bankruptcy of the person insured, or the insolvency of his estate, shall not release the insurer from payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract". Subsection 3420 (a) (1) demonstrates a legislative intent that third party claimants should not suffer as a result of bankruptcy or insolvency of the insured. Claims-made policy forms increase the possibility that claimants will be without a source of recovery for their losses. Furthermore, in light of Section 3420(a) (1), for the protection of creditors and the public-at-large, it may be prudent to require that a claims-made policy automatically revert, upon an insured becoming a bankrupt, to an occurrence policy expiring as of the date of bankruptcy. Such a requirement would have to be reflected as an additional cost of coverage. Even a business which closes operation for reasons other than bankruptcy could find the financial burden of purchasing tail coverage too onerous to bear.

(16) Certificates of insurance written on a claims-made basis provided by third parties such as contractors are worthless if such contractor or principal fails to purchase tail coverage.

(17) A referee or judge faces a difficult decision when an entity with a claims-made liability policy is the subject of a bankruptcy proceeding. If funds are limited, what priority should be placed on the purchase of appropriate tail coverage?

The above concerns have caused the Department to limit the approval of claims-made policy forms to certain exposures, typically long tailed in nature with latent injury potential and where availability problems have been demonstrated.

Aggregate Annual limit of Coverage

The current ISO CGL policy contains a limit of liability per person and per occurrence as well as an annual aggregate limit for products liability and property damage liability. The revised CGL form contains, for the first time, an annual aggregate limit which will apply to all coverages under the CGL policy. The change is needed to eliminate unknown amounts of exposure as a result of several court decisions which have interpreted one occurrence affecting several entities to be separate occurrences, and have also raised the possibility that one occurrence involving prolonged exposure to harmful conditions might be interpreted as numerous separate occurrences in a one year period.

The aggregate annual limit should eliminate most of the uncertainty of indefinite exposure to loss and facilitate proper pricing of the general liability insurance product.

While an annual aggregate limit does involve a significant restriction in coverage, it is a change that should be readily understood by insureds, and that permits insureds to protect themselves by purchasing adequate annual aggregate limits of coverage. Therefore, such a provision in the ISO CGL occurrence form is approvable.

Exclusion of Coverage For Pollution

In the current ISO CGL form, pollution coverage is excluded if the introduction of the pollutants was other than "sudden and accidental". In the revised form, coverage is still excluded whenever the introduction of pollutants was intentional or gradual. Coverage is excluded also if the emission originates on a named insured premises or a waste disposal or treatment facility. Essentially the revised forms exclude most on-premises pollution liability coverage but ISO has filed an endorsement giving the insured the option of adding such coverage back to the policy for an additional premium.

The revised pollution exclusion is necessitated by adverse court decisions involving the interpretation of "sudden and accidental" and the liabilities created by Federal Superfund legislation. It is apparent that the insurance industry, given the current climate, considers pollution to be an uninsurable exposure. As with any exposures, which as a practical matter, are uninsurable in the voluntary market (for example, flood insurance), an alternative to the insurance mechanism should be developed to cover this exposure in order to protect victims. Such alternative could be a Joint Underwriting Association (JUA), a State Fund or the Federal Government acting as an insurer.

The pollution exclusion in the standard CGL policy will permit insurers to cover otherwise uninsurable exposures and thereby the improve availability of coverage. Risks having a minimal pollution exposure can obtain pollution coverage by purchasing the optional endorsement. This change is approvable.

We appreciate the efforts made by ISO, and the many interested parties to this filing, to advise the Department of the pros and cons of the controversial elements of this filing. The Department has weighed all of the data and testimony in arriving at a decision. The Department is cognizant of the availability and affordability problems

present in the commercial liability insurance marketplace, and pledges its resources in an effort to work with Governor Cuomo, the Legislature and the industry on a program that will encourage the insurance and general business communities to commit their resources to the continuing growth of this State.

/s/ James P. Corcoran
JAMES P. CORCORAN
SUPERINTENDENT
OF INSURANCE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-88-1688-WWS

(All Cases)

IN RE: INSURANCE ANTITRUST LITIGATION

DEFENDANTS' STATE-BY-STATE APPENDIX
(Relating to Defendants' Motions on
McCarran-Ferguson Grounds and on
Statutory Interpretation,
Causation, and State Action Grounds)

* * * *

CALIFORNIA

(1) *Unfair Trade Practices Act*

(a) The California Insurance Code provides for the comprehensive regulation of all types of insurance in California by the Commissioner of Insurance through a statute based on the Model Unfair Trade Practices in Insurance Act written by the National Association of Insurance Commissioners (Cal. Ins. Code §§ 790-790.10).

(b) California law specifies that "[n]o person shall engage . . . in any trade practice which is . . . an unfair method of competition or an unfair or deceptive act or practice in the business of insurance" (Cal. Ins. Code § 790.02). Under the definitions found in the General Provisions of the Insurance Code, "person" is defined as "any person, association, organization, partnership, business trust, or corporation" (Cal. Ins. Code § 19).

(c) The California unfair trade practices law provides that "[t]he purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [McCarran-Ferguson Act]" (Cal. Ins. Code § 790).

(d) The Commissioner has broad investigative and enforcement powers under the unfair trade practices law in conjunction with the powers under the Government Code to ensure compliance with the law by issuing cease and desist orders, ordering the payment of monetary penalties, and seeking court orders enjoining and restraining unlawful conduct (*e.g.*, Cal. Ins. Code §§ 790.05, 790.07; Cal. Gov't Code §§ 11180-11181).

(2) *Supervision of Contents of Policy Forms*

The State of California supervises the contents of policy forms through the Commissioner's discretionary powers over insurers and rating organizations described *infra* in ¶ 3(b)(ii).

(3) *Supervision of Rating Organizations*

(a) *Statutory Provisions for Collective Rate and Form Making*

During the relevant time, prior to the passage of Proposition 103 on November 8, 1988, California law provided that:

> Subject to and in compliance with the provisions of this chapter authorizing insurers to be members or subscribers of rating or advisory organizations . . . two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems [or] the preparation or making of insurance policy . . . forms. . . . [Cal. Ins. Code § 1853.]

Members and subscribers of rating organizations could "use the rates, rating systems, . . . or policy . . . forms

of such organizations, either consistently or intermittently" (Cal. Ins. Code § 1853.6).

(b) *Licensing and Supervision of Rating Organizations*

(i) California law provides that "[n]o rating organization shall conduct its operations in this state without first filing with the commissioner a written application for and securing a license to act as a rating organization" (Cal. Ins. Code § 1854). In order to obtain a license as a rating organization, the applicant rating organization must file with the Commissioner of Insurance, *inter alia*, its constitution, articles of agreement or certificate of incorporation, and bylaws and rules governing the conduct of its business (*id.*).

(ii) The Commissioner of Insurance has power to ensure that the policy forms of insurers and rating organizations comply with California law. The Commissioner may, "as often as may be reasonable and necessary," examine licensed rating organizations to ascertain whether "any rate or rating system made or used by it" complies with the requirements of the rates and rating organizations chapter of the Insurance Code (Cal. Ins. Code § 1857.1). In this regard, every insurer and rating organization must "maintain reasonable records . . . of the data, statistics or information collected or used by it in connection with the . . . policy . . . forms . . . made or used by it so that such records will be available at all reasonable times to enable the commissioner to determine whether . . ., in the case of an insurer or rating organization, every rate, rating plan and rating system made or used by it, complies with the provisions of this chapter" (Cal. Ins. Code § 1857). The maintenance of such records by the rating organization of which an insurer is a member is sufficient compliance by the insurer (*id.*). The Commissioner may also hold hearings on potential violations involving the rates, rating plans

or rating systems of a rating organization and, where appropriate, may suspend or revoke its license (Cal. Ins. Code §§ 1858.3, 1858.5).

(c) *ISO License*

ISO is licensed by the State of California "to conduct its operations and act as a Rating Organization in the State of California" (Exhibit 30).

(4) *Supervision and Review of the ISO CGL Forms*

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(5) *Regulation of Reinsurance*

In addition to the unfair trade practices act discussed above in paragraph 1, California regulates reinsurers in the following ways:

(a) A reinsurer may become subject to regulation under licensing or authorization statutes (Cal. Ins. Code §§ 699 *et seq.*).

(b) Admitted reinsurers are subject to the same financial, reporting and oversight requirements as primary insurers (*e.g.*, Cal. Ins. Code §§ 699 *et seq.*). Each domestic reinsurer defendant has obtained a certificate of authority to transact business in California.

(c) Reinsurers or certain reinsurance transactions are regulated in other ways (*e.g.*, Cal. Ins. Code §§ 803, 810, and 1090).

(d) Reinsurers must meet certain specific standards if primary insurers are to receive credit (*e.g.*, in calculating assets, liabilities, reserves, risk limits) for ceded insurance (Cal. Ins. Code §§ 922.2 to 922.8).

(6) *Supervision and Review of Umbrella Excess Liability Coverage*

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CONNECTICUT

(1) *Unfair Trade Practices Act*

(a) Connecticut law provides for the comprehensive regulation of all types of insurance in Connecticut by the Commissioner of Insurance through a statute based on the Model Unfair Trade Practices in Insurance Act written by the National Association of Insurance Commissioners (Conn. Gen. Stat. §§ 38-60 to 38-64).

(b) Connecticut law specifies that "[n]o person shall engage in this state in any trade practice which is . . . an unfair method of competition or an unfair or deceptive act or practice in the business of insurance" (Conn. Gen. Stat. § 38-60). "Person" is defined as any "corporation, . . . Lloyds insurer, . . . and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters" (*id.*).

(c) [Intentionally left blank.]

(d) Connecticut law provides the Commissioner with broad investigative and enforcement powers to ensure compliance with the unfair trade practices law by issuing cease and desist orders, ordering the payment of monetary penalties, and suspending or revoking licenses (Conn. Gen. Stat. § 38-62).

(2) *Supervision of Contents of Policy Forms*

(a) The State of Connecticut supervises the contents of insurance policy forms through a file and use system. Connecticut law provides that "[t]he form of any insurance policy or contract the rates for which are subject to the provisions of this chapter . . . shall be filed with the insurance commissioner prior to its issuance" (Conn. Gen. Stat. § 38-201n(c)).

(b) Connecticut provides that "[i]f at any time the commissioner finds that any such policy, contract or endorsement is not in accordance with such provisions or any other provision of law, he may issue an order disapproving the issuance of such form and stating his reasons therefor" (Conn. Gen. Stat. § 38-201n(c)).

(c) The Connecticut Insurance Commissioner has promulgated regulations setting forth eighteen specific bases on which a policy form may be disapproved, including that the submission "contains provisions which are unfair, deceptive or may encourage misrepresentation of the policy . . . . [or] is judged to be contrary to the public interest" (Conn. Ins. Comm. Bull. No. PF-2(14 and 18)). Forms may also be disapproved if they would result in rates that are excessive, inadequate, or unfairly discriminatory (Conn. Gen. Stat. § 38-201c(a)). In addition, policy forms that provide professional liability insurance written on a claims-made basis may be disapproved if they fail to contain certain mandatory provisions (Conn. Gen. Stat. § 38-370c).

(3) *Supervision of Rating Organizations*

(a) *Statutory Provisions for Collective Rate and Form Making*

Connecticut law requires filing of various insurance documents by every admitted insurer, but specifies that "[s]uch submission by a licensed rating organization of which an insurer is a member or subscriber shall be sufficient compliance with this section . . . to the extent that the insurer uses the . . . policy . . . forms of such organization" (Conn. Gen. Stat. § 38-201n(a)). Members and subscribers of rating organizations "may use the . . . policy . . . form of such organizations, either consistently or intermittently" (Conn. Gen. Stat. § 38-201f). Connecticut law states that "two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the . . . preparation or making of insurance policies" (Conn. Gen. Stat. § 38-201d).

(b) *Licensing and Supervision of Rating Organizations*

(i) According to Connecticut law, "[n]o rating organization shall conduct its operations in this state without first filing with the insurance commissioner a written application for and securing a license to act as a rating organization" (Conn. Gen. Stat. § 38-201j(a)). In order to obtain a license as a rating organization, an applicant must file with the Commissioner of Insurance, *inter alia*, its constitution, articles of agreement or certificate of incorporation, and bylaws or rules governing the conduct of its business (Conn. Gen. Stat. § 38-201j(a)). The Commissioner "shall issue the license . . . if from such examination and investigation he is satisfied that: (1) The business reputation of the applicant and its officers is good: (2) the facilities of the applicant are adequate . . .; and (3) the applicant and its proposed plan of operation conform to the requirements of sections 38-201a to 38-201s" (Conn. Gen. Stat. § 38-201j(c)).

(ii) The Commissioner of Insurance has broad investigative and enforcement powers to ensure compliance by rating organizations with Connecticut law by holding hearings on complaints by "[a]ny person aggrieved by the action of an insurer or rating association" or by acting on his own initiative after examination of the entity's compliance with the requirements and standards of the insurance statutes (Conn. Gen. Stat. § 38-201p(a)). After a hearing, the Commissioner may suspend or revoke the license of an insurance or rating organization (*id.*). The Commissioner may, "as often as may be reasonable and necessary," examine a licensed rating organization (Conn. Gen. Stat. § 38-201o(a)). At the examination the following must be exhibited: "all books, records, accounts, documents or agreements governing its method of operation, together with all data, statistics and information of every kind and character collected or considered by such organization, group, association or insurer" (Conn. Gen.

Stat. § 38-201o(c)). In addition, every insurer and rating organization must

> maintain reasonable records . . . of the data, statistics or information collected or used by it in connection with the . . . policy . . . forms . . . made or used by it so that such records will be available at all reasonable times to enable the insurance commissioner to determine whether . . ., in the case of an insurer or rating organization, every rate, rating plan or rating system made or used by it, complies with the provisions of this chapter [682a] applicable to it. [Conn. Gen. Stat. § 38-201m(a).]

(c) *ISO License*

ISO is licensed by the State of Connecticut "to act as a Rating Organization in the State of Connecticut" (Exhibit 37).

(4) *Supervision and Review of the ISO CGL Forms*

(a) By letter dated July 12, 1985 (Exhibit 38), the Connecticut Department of Insurance advised ISO that, despite the Department's appreciation of the "considerable time and effort" expended by ISO (*id.* at p. 1), including "several meetings and conferences" between the Department and ISO (*id.*), the Department had decided to disapprove the CGL occurrence and claims-made forms as amended (GL 84-084CP(B)), citing, among other reasons, the following:

> The departure from the traditional system of risk acceptance to risk avoidance and risk transfer to the policyholder from the insurer.
>
> The current claims made proposal "trigger" is not acceptable. The requirement that the policyholder notify the company of incidents but that the policy will respond upon receipt of the claim places the insured in jeapordy [sic] if the company cancels or

requires the insured to purchase run-off coverage at excessive rates. . . . The mini-tail is not sufficient.

. . . Our standards (statutory) are that the policyholder has a contractual right to purchase prior acts and/or run-off coverage at a fixed cost throughout the policy period, and a grace period at termination. Non-payment does not invalidate this right of the insured.

. . . We do not agree with the ISO claims made pricing as being reasonable for the coverage provided. . . .

• • • •

. . . Introduction of aggregate limits is questioned inasmuch as ISO proposes an absolute pollution exclusion. It is the pollution problem uncertainty which creates a limits problem (multiple claims stacking, etc.). [*Id.* at pp. 1, 2.]

(b) Under cover of a letter dated October 28, 1985, ISO submitted the third amended versions of the CGL forms (GL 84-084(C) Amendment) to the Department of Insurance (*see* Group Exhibit 5).

(c) By Notice of Decision dated December 31, 1985 (Exhibit 39), the Commissioner of the Connecticut Insurance Department, following "a lengthy and complex investigation of the 'claims made system' of insurance proposed to be introduced [by ISO]," (*id.* at p. 1), disapproved the claims-made form. "As a part of the investigation, public comment and information was sought at various meetings . . . with representatives of ISO, the insurance agents association, the insurance risk managers, as well as other state insurance regulators" (*id.*). In the Notice of Decision, the Commissioner specified the following reasons for his ruling:

(i) Based upon this investigation it is determined that ISO's . . . (Claims-Made) policy form . . . fails

to meet the statutorily imposed requirements of Section 38-370c of the Connecticut General Statutes as applied to professional policies in failing to include provisions for the purchase of prior acts and variable coverage on a contractual basis. . . . [T]he failure to provide information relative to remaining insurance available to the insured at the time of purchase of an extended tail coverage results in the insured being denied basic information necessary to make an informed judgement [sic]. [*Id.* at pp. 1-2.]

(ii) The ability to charge up to 200% of the last annual premium for the purchase of tail coverage which may range from no insurance, because the aggregate limit has already been exceeded, or the full face value because there have been no claims assessed against the policy, places the insured in the untenable position of having to guess what insurance coverage will remain. Additionally, such a practice results in unfair discrimination, prohibited by Section 38-201c(a). . . . When, as in Connecticut, the public's right to know is central to all consumer legislation, and insurance contracts are statutorily required to be written in clear language, this deficiency cannot be tolerated. [*Id.* at p. 2.]

(iii) The . . . terms [of the proposed claims-made form] would eliminate a commercial insured's ability to assure himself of full coverage, regardless of the price he was willing to pay. The insurers' ability to cancel, nonrenew, advance retroactive dates, refuse tail coverage, and issue lazer [sic] endorsements, all on a unilateral basis, would deny policyholders any reasonable expectation that a Claims-Made policy would ultimately provide the coverage sought. [*Id.* at pp. 6-7.]

(i) ISO has consistently asserted that its members would not abuse their policyholders through arbitrary or unreasonable exercise of contract rights; and that

the use of this policy forms [sic] would be generally limited to large commercial insureds with high losses and long indeterminate loss payout periods. . . . The new Claims Made Form is filed for general use. If the ISO filing were approved it could be sold by a member company to any small business as well as the largest corporations in the State. . . . Insurance contracts need not, and should not, leave policyholders at the mercy of their insurers' good will and unilateral judgement. [*Id.* at p. 7.]

(v) ISO, by its various amendments to form filing number GL 84-084CP, has made numerous changes in a good faith effort to eliminate problems disclosed by the current investigation. . . . With these and other changes ISO made significant progress toward eliminating the deficiencies of the original Claims Made filing. However, several key problems remain. Although ISO has indicated a willingness to continue working towards their elimination, [the claims-made] policy form . . . cannot be approved until they are addressed. [*Id.* at pp. 8, 9.]

(vi) Although it is the understanding of this Department that a separate filing addressing the question of defense cost within aggregate limits is being considered, no changes have been made to eliminate the allocation of defense litigation costs to the policies aggregate liability limit. This handling of defense cost is contrary to general custom and practice and is unacceptable for several reasons. It places a burden on the insured to cover costs which he is powerless to control, and which may significantly reduce the aggregate limit of liability. The result would be that the insured may have less coverage remaining than he is aware of, or requires. Litigation defense costs have been traditionally born [sic] by insurers because the defense activities benefit the insurer as much if not more than the insured.

Insufficient justification has been presented which would warrant such a major change in insurance practice on this broad scale. [*Id.* at p. 12.]

(vii) The undersigned is satisfied that the insurance industry has fairly demonstrated a need for a Claims Made form of insurance, specifically in long tail types of commercial coverage. However, the changes which are being required prior to approval of such a policy form within this State are essential if the interests of the public are to be protected. [*Id.* at p. 12.]

In disapproving the CGL claims-made form, the Commissioner noted that his order should not be considered or construed as a disapproval of the CGL occurrence form as filed and amended and was entered "without prejudice to any subsequent refiling by [ISO]" (*id.* at p. 13).

(d) After ISO revised the CGL forms to address the standards set forth in the NAIC's CGL Extended Reporting Model Act (*see* Defendants' Statement, ¶ C(7)), ISO filed with the Connecticut Department of Insurance new versions of the forms under the filing designation GL 86-086FE, under cover of an ISO letter dated January 17, 1986 (*see* Group Exhibit 7).

(e) The Connecticut Insurance Department approved the CGL occurrence and claims-made forms effective February 5, 1986 (Group Exhibit 40).

(5) *Regulation of Reinsurance*

In addition to the unfair trade practices act discussed above in paragraph 1, Connecticut regulates reinsurers in the following ways:

(a) A reinsurer may become subject to regulation under licensing or authorization statutes (Conn. Gen. Stat. § 38-20).

(b) Admitted reinsurers are subject to the same financial, reporting and oversight requirements as primary insurers (*e.g.*, Conn. Gen. Stat. §§ 38-24, 38-25). Each domestic reinsurer defendant, except Mercantile & General Reinsurance and "Winterthur" Swiss Insurance Company, has obtained a certificate of authority to transact business in Connecticut.

(c) Reinsurers or certain reinsurance transactions are regulated in other ways (*e.g.*, Conn. Gen. Stat. §§ 38-452).

(d) Reinsurers must meet certain specific standards if primary insurers are to receive credit (*e.g.*, in calculating assets, liabilities, reserves, risk limits) for ceded insurance (Conn. Gen. Stat. §§ 38-110, 38-233).

(6) *Supervision and Review of Umbrella Excess Liability Coverage Forms*

In accordance with the Connecticut filing requirements described above in paragraph 2, defendant primary insurers filed their commercial umbrella excess forms with the Connecticut Department of Insurance (*see infra* Group Exhibits 41-44).

(a) The Department requested certifications that Aetna's commercial excess liability (umbrella) insurance coverage forms and Allstate's commercial umbrella excess liability policy forms were in compliance with Connecticut law. Both Aetna (Group Exhibit 41) and Allstate (Group Exhibit 42) submitted, along with the certifications, amendatory cancellation/nonrenewal endorsements that complied with Connecticut termination requirements.

(b) The Department required INA to modify several of the provisions in its commercial umbrella liability form filing before it would be acceptable for use in the state. Specifically, the Department required INA to modify the forms' cancellation/nonrenewal provisions. After receiving a list of the Department's concerns, INA withdrew three of its forms (Group Exhibit 43).

(c) Hartford filed its umbrella liability pollution hazard exclusion, excess liability pollution hazard exclusion, excess liability forms, and umbrella liability forms with the Department. In accordance with Connecticut's "file and use" system, Hartford waited for the statutory period to receive any comments from the Department. When no comments were received, the forms were put into use (Group Exhibit 44).

* * * *

MONTANA

(1) *Unfair Trade Practices Act*

(a) Montana law provides for the comprehensive regulation of all types of insurance in Montana by the Commissioner of Insurance through a statute based on the Model Unfair Trade Practices in Insurance Act written by the National Association of Insurance Commissioners (Mont. Code Ann. §§ 33-18-101 to 33-18-1005).

(b) Montana law specifies that "[n]o person shall engage in this state in any trade practice which is . . . an unfair method of competition or an unfair or deceptive act or practice in the business of insurance" (Mont. Code Ann. § 33-18-102). "Person" is defined as "an . . . insurer, . . . , association, organization, Lloyd's, . . . corporation, or any other legal entity" (Mont. Code Ann. § 33-1-202(3)).

(c) The Montana unfair trade practices law specifies that "[t]he purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of [C]ongress as expressed in the [McCarran-Ferguson Act]" (Mont. Code Ann. § 33-18-101).

(d) The Montana Commissioner has broad investigative and enforcement powers to ensure compliance with the unfair trade practices law, including the power to issue

cease and desist orders, to order the payment of monetary penalties, and to seek court orders enjoining and restraining unlawful conduct (Mont. Code Ann. §§ 33-1-701 to 33-1-705, 33-18-1003 to 33-18-1005).

(2) *Supervision of Contents of Policy Forms*

(a) The State of Montana supervises the contents of insurance policy forms through a prior approval system. Montana law provides that "[n]o insurance policy . . . shall be delivered or issued for delivery in this state unless the form has been filed with and approved by the commissioner of this state" (Mont. Code Ann. § 33-1-501(1)).

(b) Montana law requires any policy form to be filed with the Commissioner of Insurance not less than sixty days prior to delivery (Mont. Code Ann. § 33-1-502(2)). During the sixty-day period, the Commissioner may "affirmatively approve or disapprove any such form" (*id.*).

(c) Montana has established statutory criteria for the disapproval of forms, permitting the Commissioner to disapprove or withdraw any previous approval of a policy form if it "contains or incorporates by reference . . . any inconsistent, ambiguous, or misleading clauses or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract," or contains a misleading title (Mont. Code Ann. § 33-1-502(1-4)).

(3) *Supervision of Rating Organizations*

(a) *Statutory Provisions for Collective Rate and Form Making*

Montana law provides that "[a]s to forms for use in . . . casualty . . . coverages, the filing required by this subsection may be made by a rating organization on behalf of its members and subscribers" (Mont. Code Ann. § 33-1-501(1)). Montana law also provides that "two or

more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems, [or] the preparation or making of insurance policy or bond forms" (Mont. Code Ann. § 33-16-301).

(b) *Licensing and Supervision of Rating Organizations*

(i) According to Montana law, "[n]o rating organization shall conduct its operations in this state without first filing with the commissioner a written application for and securing a license to act as a rating organization" (Mont. Code Ann. § 33-16-401(1)). In order to obtain a license as a rating organization, the applicant rating organization must file with the Commissioner of Insurance its constitution, articles of agreement or certificate of incorporation, and bylaws or rules governing the conduct of its business (Mont. Code Ann. § 33-16-401(2)(a)).

(ii) The Commissioner of Insurance has broad investigative and enforcement powers to ensure compliance by rating organizations with Montana law. The Commissioner "shall, at least once every 5 years, and may as often as may be reasonable and necessary, make . . . an examination of each licensed rating organization" (Mont. Code Ann. § 33-16-106(1)(a)). The Commissioner may hold hearings on allegedly unlawful activity, and suspend or revoke the license of an insurance or rating organization (Mont. Code Ann. §§ 33-1-701, 33-16-111, 33-16-206).

(c) *ISO License*

ISO is licensed by the State of Montana "to act as a Rating Organization" (Exhibit 95).

(4) *Supervision and Review of the ISO CGL Forms*

[Intentionally left blank.]

(5) *Regulation of Reinsurance*

In addition to the unfair trade practices act discussed above in paragraph 1, Montana regulates reinsurers in the following ways:

(a) A reinsurer may become subject to regulation under licensing or authorization statutes (Mont. Code Ann. § 33-2-101).

(b) Admitted reinsurers are subject to the same financial, reporting and oversight requirements as primary insurers (*e.g.*, Mont. Code Ann. §§ 33-2-106, 33-2-109 to 112, 33-2-115). Each domestic reinsurer defendant, except Constitution Reinsurance and Mercantile & General Reinsurance, has obtained a certificate of authority to transact business in Montana.

(c) Reinsurers or certain reinsurance transactions are regulated in other ways (*e.g.*, Mont. Code Ann. §§ 33-2-1205, 33-2-1206, 33-2-1211, 33-2-1212).

(d) Reinsurers must meet certain specific standards if primary insurers are to receive credit (*e.g.*, in calculating assets, liabilities, reserves, risk limits) for ceded insurance coverage (Mont. Code Ann. §§ 32-2-501(8, 9), 33-2-1205(2-4)).

(6) *Supervision and Review of Umbrella Excess Liability Coverage Forms*

In accordance with the Montana filing requirements described in paragraph 2 above, defendant primary insurers filed their commercial general liability umbrella excess forms with the Montana Insurance Department (*see infra* Group Exhibits 96-99).

(a) The Department approved Aetna's commercial excess liability (umbrella) insurance coverage forms (Group Exhibit 96), Allstate's commercial umbrella excess liability forms (Group Exhibit 97), and INA's commercial umbrella policy forms (Group Exhibit 98) subject to inclusion of amendatory endorsements to bring the forms' cancellation provisions in compliance with Montana law.

(b) The Department approved Hartford's umbrella liability pollution hazard exclusion, excess liability pollution exclusion, umbrella liability policy forms and endorsements, and excess general liability forms filings (Group Exhibit 99).

* * * *

NEW YORK

(1) *Unfair Trade Practices Act*

(a) New York law provides for the comprehensive regulation of all types of insurance in New York by the Superintendent of Insurance through a statute based on the Model Unfair Trade Practices in Insurance Act written by the National Association of Insurance Commissioners (N.Y. Ins. Law §§ 2401 to 2409).

(b) New York law specifies that "[n]o person shall engage in this state in any trade practice constituting a defined violation or a determined violation as defined in the article" (N.Y. Ins. Law § 2403). "Person" is defined as "any legal entity subject to any provision of this chapter, engaged in the business of insurance in this state, including any . . . Lloyds insurer" (N.Y. Ins. Law § 2402(a)). New York law defines "insurance business" to include "a reinsurance business" (N.Y. Ins. Law § 1101(b)(1)(D)).

(c) The New York unfair trade practices law provides that "[t]he purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of [C]ongress as expressed in [the McCarran-Ferguson Act]" (N.Y. Ins. Law § 2401).

(d) The New York Superintendent has broad investigative and enforcement powers to ensure compliance with the unfair trade practices law, including the power to

issue cease and desist orders, to order the payment of monetary penalties, and to seek court orders enjoining and restraining unlawful conduct (N.Y. Ins. Law §§ 2405-2409).

(2) *Supervision of Contents of Policy Forms*

(a) The State of New York supervises the contents of insurance policy forms through a prior approval system.

(b) Pursuant to New York law, "[n]o policy form shall be delivered or issued for delivery unless it has been filed with the superintendent and either he has approved it, or thirty days have elapsed and he has not disapproved it" (N.Y. Ins. Law § 2307(b)). After notice and hearing "to the insurer or rate service organization which submitted a policy form for approval, the superintendent may withdraw approval of such form on finding that the use of such form is contrary to the legal requirements applicable at the time" (*id.*).

(c) New York has established statutory grounds for disapproval of policy forms, authorizing the superintendent to disapprove a form if, *inter alia*, it is "misleading or violative of public policy" (N.Y. Ins. Law § 2307(b)).

(3) *Supervision of Rating Organizations*

(a) *Statutory Provisions for Collective Rate and Form Making*

A rate service organization is defined to include "a person or entity which prepares and files policy forms and endorsements on behalf of insurers" (N.Y. Ins. Law § 2313(a)). New York law authorizes "[c]ooperation among rate service organizations or among rate service organizations and insurers in rate making or in other matters within the scope of this article [23]" (N.Y. Ins. Law § 2313(o)). Policy form filings are within the scope of Article 23 under Sections 2307 and 2313(a). New York law also provides that "[a]n insurer or group

of insurers may discharge the rate filing obligation . . . by giving notice . . . that it uses rates and rate information prepared by a designated rate service organization" (N.Y. Ins. Law § 2306).

(b) *Licensing and Supervision of Rating Organizations*

(i) According to New York law, "no insurer shall utilize the services of a rate service organization unless the organization has obtained a license" (N.Y. Ins. Law § 2313(b)). In order to obtain a license, the applicant rate service organization must file with the Superintendent of Insurance, *inter alia*, its constitution, articles of agreement or certificate of incorporation, and bylaws or rules governing the conduct of its business (N.Y. Ins. Law § 2313(d)(1)). "If the superintendent finds that the applicant . . . [is] competent, trustworthy, and technically qualified to provide the services proposed, and that all requirements of law are met, he shall issue a license specifying the authorized activity of the applicant" (N.Y. Ins. Law § 2313(g)).

(ii) The Superintendent of Insurance has broad investigative and enforcement powers to ensure compliance by rating organizations with New York laws. As often as the Superintendent deems it expedient, every licensed rate service organization may be examined (N.Y. Ins. Law § 2321(a)). Upon his own initiative or upon application by "any aggrieved person" the Superintendent may hold hearings on alleged violations by rate service organizations and impose appropriate sanctions (N.Y. Ins. Law § 2321). With respect to the collective activities among rate service organizations and insurers, New York law provides:

> The superintendent may review such cooperative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair or unreasonable or otherwise inconsistent with this ar-

> ticle, he may issue an order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with this article, and requiring the discontinuance of such activity or practice. [N.Y. Ins. Law § 2313(o).]

New York law also prohibits eleven specific types of anticompetitive behavior in which insurers or rate service organizations might engage (N.Y. Ins. Law § 2316).

(c) *ISO License*

ISO is licensed by the State of New York "as a Rate Service Organization" (Exhibit 110).

(4) *Supervision and Review of the ISO CGL Forms*

(a) By letter dated July 24, 1984 (Exhibit 111), the New York Insurance Department notified ISO that the CGL occurrence and claims-made forms were not approved.

(b) On April 25, 1985, the New York Insurance Department issued a news release (Exhibit 112) stating that "Superintendent of Insurance James P. Corcoran has announced that a public hearing will be held to highlight the possible advantages and potential disadvantages of a new 'claims-made' policy form, proposed by ISO . . . for commercial general liability policies," to be held on May 16, 1985 (*id.* at p. 1).

(c) By letter dated October 11, 1985 (Exhibit 113), the New York Insurance Department notified ISO that the CGL occurrence and claims-made forms, as amended by filings GL 84-084CP(A), GL 84-084CP(B), and GL 84-084CP(C), were "not approved" pending answers by ISO to specific questions posed by the Department with respect to the forms.

(d) Also on October 11, 1985, the Superintendent of the New York Insurance Department issued an Opinion and Decision on Significant Issues Raised by Insurance Services Offices Inc. Filing on Commercial General Liability Claims-Made Policy Form (Exhibit 114), in which the Superintendent disapproved the CGL claims-made form as amended, approved the pollution exclusion provision, and indicated that he was still reviewing the CGL occurrence form.

(i) In the Opinion, the Superintendent noted that:

> In view of the extreme importance of this filing, the Department has solicited the views of all parties concerned with the commercial liability insurance product. The filing was the subject of a Public Hearing held at the Department on May 16, 1985 and many meetings with ISO and other concerned parties. A Joint Forum on the filing, sponsored by the Illinois, New York and Texas Insurance Departments took place on July 25, 1985 in Chicago, Illinois. [*Id.* at p. 2.]

(ii) In rendering his opinion, the Superintendent of Insurance acknowledged that "[a] need does exist to reduce an insurer's potential exposure caused by adverse and often contradictory court decisions, to enable insurers to better predict their potential loss exposure in order that the pricing of their product may be based on reasonable loss expectations" (*id.* at p. 3). However, the Department did "not agree that the claims-made policy form offers a long-term solution to uncertainty problems caused by adverse and/or contradictory court decisions and was of the opinion that such form should only be utilized on risks involving long-tail or latent injury exposures where there is a determined availability problem" (*id.*).

(iii) In disapproving the claims-made version of the revised ISO CGL policy, the Superintendent stated that "[a]ll claims-made policy forms previously approved or to be approved in the future will be required to meet specified minimum standards, as set forth in a regulation

to be promulgated by the Department" (*id.* at p. 4). These minimum standards were to concern a variety of issues including extended claim reporting periods (tail) in the claims-made form, tail coverage, annual premiums, and retroactive date (*id.* at pp. 4-5).

(iv) The Superintendent noted "the principle bases for the Department's disapproval . . . of ISO's claims-made CGL policy form" (*id.* at p. 11). These included the Superintendent's observation that

> [t]he freedom of an insured to shift its business to another insurer will be more restricted as such transfer will necessitate the purchase of a tail from the current insurer or nose coverage from the new insurer at a rate up to 200% of the current year's premium plus payment of a full year's premium to the new insurer. [*Id.* at p. 13.]

(v) In approving the revised pollution exclusion, the Superintendent stated:

> The revised pollution exclusion is necessitated by adverse court decisions involving the interpretation of "sudden and accidental" and the liabilities created by Federal Superfund legislation. It is apparent that the insurance industry, given the current climate, considers pollution to be an uninsurable exposure. . . . The pollution exclusion in the standard CGL policy will permit insurers to cover otherwise uninsurable exposures and thereby the [sic] improve availability of coverage. Risks having a minimal pollution exposure can obtain pollution coverage by purchasing the optional endorsement. This change is approvable. [*Id.* at p. 17.]

(vi) The New York Superintendent also made clear the willingness of the New York Department of Insurance to participate with the industry in revisions to the forms, stating:

> An effort should be made by all parties at interest to provide a workable definition of occurrence that will reflect the exposure contemplated for the premium charged. The Department stands ready to assist the industry in drafting policy language or legislation that will rationalize inconsistent court decisions. [*Id.* at p. 11.]
>
> * * * *
>
> We appreciate the efforts made by ISO, and the many interested parties to this filing, to advise the Department of the pros and cons of the controversial elements of this filing. The Department has weighed all of the data and testimony in arriving at a decision. The Department is cognizant of the availability and affordability problems present in the commercial liability insurance marketplace, and pledges its resources in an effort to work with . . . the industry on a program that will encourage the insurance and general business communities to commit their resources to the continuing growth of this State. [*Id.* at p. 17.]

(e) By letter dated October 11, 1985 (Exhibit 115), the New York Insurance Department submitted a list of questions to ISO concerning various provisions and aspects of the CGL occurrence and claims-made forms as amended. ISO responded to those questions by letter dated November 15, 1985 (Exhibit 116).

(f) By letter dated December 16, 1985 (Exhibit 117), the New York Insurance Department confirmed a telephone conversation with ISO advising that the claims-made forms were still not approved in accordance with Superintendent Corcoran's decision of October 11, 1985 (*id.*).

(g) By letter dated February 12, 1986 (Exhibit 118), the New York Insurance Department notified ISO of its continuing disapproval of the 1986 claims-made version of the CGL form, stating:

As you are aware, for reasons set forth in its Opinion and Decision dated October 11, 1985 the Department has determined that ISO's proposed Commercial General Liability (CGL) claims-made policy form does not meet the statutory requirements of Section 2307(b) of the Insurance Law.

We have reviewed the various amendments submitted, including those detailed in your letter of January 17, 1986 [submitting the GL 86-086 FE filing], and find that they do not form a basis to revise the Department's premise for disapproving the initial claims-made policy filing. The Department is still of the opinion that widespread use of the claims-made policy is inappropriate and unnecessary for most CGL risks. Therefore, ISO's CGL claims-made policy as originally submitted as well as *all* subsequent amendments and endorsements pertaining to claims-made policies remain disapproved. . . . Please note that ISO's proposed CGL occurrence policy form and related amendments and endorsements which have been filed simultaneously with the claims-made are currently under review and remain unapproved. [*Id.*]

(h) By letter dated February 14, 1986 (Exhibit 119), the New York Insurance Department notified ISO that the CGL occurrence form had not been amended to address the Department's concerns expressed in its December 16, 1985 letter to ISO concerning the omission of the terms "groundless, false or fraudulent" in the occurrence policy, and, therefore, "the occurrence policy portion . . . remains not approved."

(i) By letter dated March 17, 1986 (Exhibit 120), ISO unbundled the revised CGL occurrence form from the revised CGL claims-made form and filed it with the New York Superintendent of Insurance, stating that ISO had "sought and received authorization from the ISO Board of Directors to file an 'occurrence'-only version of the program in those few states where approval of the full [CGL] program is not expected in the near future" (*id.*).

(j) By letter dated March 21, 1986 (Exhibit 121), the New York Insurance Department notified ISO that the unbundled CGL occurrence form had been approved effective April 1, 1986 in accordance with ISO's request.

(k) On July 16, 1986, the New York Insurance Department issued a news release announcing that the New York Insurance Department had promulgated Regulation No. 121 (Group Exhibit 122) governing the approval of claims-made forms "the original of [which could] be found in the Department's October 11, 1985 Opinion and Decision, which deals in detail with the claims-made concept" (*id.* at news release p. 1). According to the release:

> Regulation No. 121 reaffirms the Department's position that widespread use of the claims-made policy approach would be inappropriate as well as unnecessary for most Commercial General Liability (CGL) risks. The claims-made approach is nonetheless appropriate for certain types of liability risks. The Regulation, therefore, identifies those specific areas and articulates pertinent criteria. In those areas where claims-made policies are permitted, the Regulation also prescribes minimum standards applicable to such policies. [*Id.* at p. 1.]
>
> * * * *
>
> Pursuant to Regulation No. 121, the Department will continue to approve claims-made policies, if they meet minimum standards, where substantial availability problems have been experienced or where the exposure has long-tail or latent injury characteristics. Thus claims-made policies are permissible in connection with the following specific types of coverages or risks: . . . pollution and environmental impairment liability; . . . public entity liability; . . . product liability . . . . [*Id.* at p 2.]

(1) On January 30, 1987, the New York Insurance Department issued a news release (Exhibit 123) announcing that the New York Superintendent of Insurance had that day "proposed a series of significant changes to existing Department regulations dealing with claims-made policies and legal defense cost treatment in connection with liability insurance policies," and had announced a public hearing to be held on February 20, 1987 (*id.* at p. 1).

(m) Effective August 21, 1987, Regulation No. 121, which concerns the minimum standards applicable to claims-made policies, was amended by the New York Insurance Department (Exhibit 124).

(5) *Regulation of Reinsurance*

In addition to the unfair trade practices act discussed above in paragraph 1, New York regulates reinsurers in the following ways:

(a) A reinsurer may become subject to regulation under licensing or authorization statutes (N.Y. Ins. Law §§ 1102, 1114).

(b) Admitted reinsurers are subject to the same financial, reporting and oversight requirements as primary insurers (*e.g.*, N.Y. Ins. Law §§ 307(a)(1), 308, 309(a), 1301, 1304, 1305). Each domestic reinsurer defendant has obtained a certificate of authority to transact business in New York.

(c) Reinsurers or certain reinsurance transactions are regulated in other ways (*e.g.*, N.Y. Ins. Law §§ 1114 (a-b), 1308, 4102(c), N.Y. Admin. Code tit. 27, § 86.2).

(d) Reinsurers must meet certain specific standards if primary insurers are to receive credit (*e.g.*, in calculating assets, liabilities, reserves, risk limits) for ceded insurance (N.Y. Ins. Law §§ 1115(a), 1301(a)(11, 14, 15), 1305(b)(3), 1308, 4118(a)(1)(A), N.Y. Admin. Code tit. 27, Part 125).

(6) *Supervision and Review of Umbrella Excess Liability Coverage Forms*

Defendant primary insurers filed their commercial general liability umbrella excess forms with the New York Insurance Department (*see infra* Group Exhibits 125, 127, 128, and Exhibit 126).

(a) The Department required Aetna to make several changes in Aetna's commercial excess liability (umbrella) insurance coverage forms before the Department would give its approval. Specifically, the Department required Aetna to change its claims-made umbrella forms in order to comply with Regulation 121, which establishes the minimum terms and conditions that claims-made policies must contain before they can be approved in New York State. In addition, the Department required Aetna to amend its filinffig to comply with the cancellation/nonrenewal provisions contained in Chapter 220 of the Laws of 1986. Other changes were required by the Department before it approved Aetna's filing (Group Exhibit 125).

(b) The Department disapproved INA's "schools" endorsement to the commercial umbrella liability policy forms because it was the Department's position that the endorsement violated public policy (Exhibit 126).

(c) The Department required Allstate to make several changes in its commercial umbrella/excess liability policy forms in order to obtain approval to use the forms in New York. Specifically, the Department required Allstate to modify its forms to comply with a number of New York's laws, including those governing cancellation/nonrenewal requirements, minimum SERP requirements, and disclosure notice requirements for claims-made forms. Additionally, in response to the Department's concerns, Allstate withdrew its claims-made commercial umbrella/excess liability policy forms from review. (Group Exhibit 127).

(d) The Department approved Hartford's umbrella liability pollution hazard exclusion and excess liability pollution hazard exclusion form filings (Group Exhibit 128).

* * * *

FLORIDA

* * * *

(3) *Supervision of Rating Organizations*

(a) Statutory Provisions for Collective Rate and Form Making

One of the purposes of the rates and rating organization part of the Florida insurance statutes is "[t]o authorize cooperation between insurers in ratemaking and other related matters" (Fla. Stat. § 627.031(1)(d)). Florida law authorizes cooperation in the making of policy forms as follows: "[T]wo or more insurers may act in concert with each other and with others with respect to any matters pertaining to . . . [t]he preparation or making of insurance policy . . . forms" (Fla. Stat. § 627.314(1)). In addition, Florida law states that "[l]icensed rating organizations and authorized insurers are authorized to exchange information and experience data with rating organizations and insurers in this and other states and may consult with them with respect to rate making and the application of rating systems" (Fla. Stat. § 627.314(4)).

* * * *

ILLINOIS

* * * *

(3) *Supervision of Rating Organizations*

(a) Statutory Provisions for Collective Rate and Form Making

Illinois law authorizes cooperation in the making of policy forms. Illinois law provides that "[c]ompanies

that are members of an [advisory] organization, bureau or association may have [policy forms] filed for them by [the] organization, bureau or association" (Ill. Ann. Stat. ch. 73, § 755(2); *see also* Ill. Admin. Code tit. 50, § 753.10(b)). Any advisory organization is authorized "to formulate insurance policies . . . and to furnish that which it prepares to its members and subscribers" (Ill. Ann. Stat. ch. 73, § 735A-9(1)). With respect to such activities of an advisory organization, "two or more companies are authorized to act in concert with each other and with others" (Ill. Ann. Stat. ch. 73, § 735A-9(2)). Moreover, "[a]dvisory organizations, or advisory organizations and companies may exchange the type of information . . . authorized under this Article" (Ill. Ann. Stat. ch. 73, § 735A-12).

* * * *

[PLAINTIFF STATES' UNIFIED DISTRICT COURT BRIEF]

MCCARRAN-FERGUSON ACT AND LEGISLATIVE HISTORY APPENDIX

* * * *

B. LEGISLATIVE HISTORY EXCERPTS

Set out here are key excerpts from the legislative history of the McCarran-Ferguson Act.

1. 90 Cong. Rec. A4406 (1944) (Joint Statement of Chairmen of NAIC on proposed bill):

> No exemption is sought nor expected for oppressive or destructive practices. On the whole, insurance has been conducted on a high plane, with great benefit to the public, and if inconsistent procedures are found they must be eradicated. Provision is made that the Sherman Act shall not now or hereafter be inapplicable to any act of boycott, coercion, or intimidation.
>
> . . . .

2. 90 Cong. Rec. A4407 (1944) (NAIC Memorandum of Explanation):

> [Subsection (b) of the NAIC proposed bill] is based, in a general way, upon the decision of the United States Supreme Court in the case of *Parker v. Brown*, supra.
>
> This subsection likewise is intended to put without the scope of the Sherman Act certain cooperative efforts among and between insurers which are regarded as in the public interest. For instance, cooperative service, adjustment and inspection agreements reduce costs. Likewise, the collection of statistical data is essential for rate-making purposes. . . .
>
> Briefly, this subsection recognizes that if insurers are to be permitted to combine not only for rate-making purposes, but to enforce as well by agreement the use of the rates so made, their activity shall be subject to legal review by State authority. It also gives consideration to the principle of States' rights by giving cognizance to the prerogative of any State to choose between rate regulation and so-called open competition. However, in the latter event the competition must in fact be open. No twilight zone is permitted, and where any group of insurers seek [sic] to act in concert to enforce so-called advisory rates, the antitrust laws will not be inapplicable.
>
> . . . .

3. 91 Cong. Rec. 478 (1945):

> *Mr. McKELLAR*:
>
> As I understand the bill its purpose and effect will be to establish the law as it was supposed to be prior to the rendering of the recent opinion of the Supreme Court of the United States [*Southeastern Underwriters*]. Is that correct?
>
> *Mr. FERGUSON*: No.

4. 91 Cong. Rec. 479 (1945):

> *Mr. MURDOCK*:
>
> Does the bill in its present form contemplate that a State legislature may enact laws which would permit agreements in violation of the Sherman Act?
>
> *Mr. FERGUSON*:
>
> I would say that until June 1, 1947, State legislatures could enact laws which would be in conflict with the Sherman Act, but could not pass laws which would permit either an agreement or an act on the part of an insurance company, or insurance companies, of boycott, coercion, or intimidation.

5. 91 Cong. Rec. 479 (1945):

Mr. FERGUSON:

I do not believe that under the bill a State could pass a law permitting an agreement or an act of boycott, coercion, or intimidation.

6. 91 Cong. Rec. 480 (1945):

Mr. O'MAHONEY:

Does the Senator from Michigan conceive that the pending bill . . . has the effect of making it possible for any State to authorize attempts on the part of any group of insurance companies to monopolize the business of insurance. I did not understand that to be the opinion of the Senator from Michigan.

Mr. FERGUSON:

No. I will answer that by saying that if agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void, because they would contradict the bill which is now being considered by the Senate and which it is hoped will be passed today. But certain agreements might be permitted in the States if they did not violate the terms of this bill.

7. 91 Cong. Rec. 480-81 (1945):

Mr. FERGUSON:

A State law . . . relating to regulation, for instance, the fixing of rates, or the fixing of the terms of a contract of insurance, which might under some definitions of monopoly be monopolistic, would be permitted under the pending bill; but if the State law undertook to authorize a boycott, a coercion, or an intimidation, or an

agreement to do any one of those three things, then it would be clearly void because Congress would have already spoken, and once Congress speaks on interstate commerce, no State can speak contrary to the congressional declaration.

8. 91 Cong. Rec. 1443 (1945):

Mr. FERGUSON:

I believe that a statement as to the fair construction of the act would add to the helpfulness of what the Senator from Nevada has said. There are certain things which a State cannot interfere with. It cannot interfere with the application of the Sherman Act to any agreement to boycott, coerce, or intimidate, or an act of boycotting, coercion, or intimidation.

Mr. McCARRAN: Not at any time.

Mr. FERGUSON: Not at any time.

Mr. McCARRAN:

Nor is the control of those matters under the specified antitrust acts removed at any time.

9. 91 Cong. Rec. 1444 (1945):

Mr. O'MAHONEY:

They [the Sherman Act and the Clayton Act] "shall be applicable"—there is a positive declaration—"to the business of insurance to the extent such business is not regulated by State law," as was stated by one of the House Members of the conference committee . . . . I do not conceive this to be a grant of power to the States to authorize by permissive legislation obviously adverse combinations which would be against the public interest.

Mr. PEPPER:

Am I correct in saying that under the proviso which the Senator has just read, if a State made it an offense, under the laws of the State, to engage in combinations in restraint of trade, the Sherman Antitrust Act could not apply to combinations and restraints of trade by companies engaged in business in that State? Is that not what it means?

Mr. O'MAHONEY:

No; I think that, for example, a rating bureau, formerly agreement [sic] among insurance companies, under the supervision and regulation of the State, would be permitted.

10. 91 Cong. Rec. 1444 (1945):

Mr. WHITE:

My view is that the State may regulate. If, however, the State goes only to the point indicated [prohibiting restraints of trade], then these Federal statutes apply throughout the whole field beyond the scope of the State's activity.

11. 91 Cong. Rec. 1444 (1945):

Mr. BARKLEY:

I should like to ask, in this connection, whether, where States attempt to occupy the field—but do it inadequately—by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdicion[sic], it is the Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover, these acts still would apply?

Mr. McCARRAN: That is my interpretation.

12. 91 Cong. Rec. 1480 (1945):

Mr. O'MAHONEY:

I sympathize very deeply with the concern which the Senator from Florida [Mr. Pepper] has expressed this morning lest anything should be done by the Congress which would enable private abuses to continue in the insurance field. I am convinced, however, that the apprehensions which the Senator states with respect to this conference report are not well founded.

I wish to call the Senator's attention to the Supreme Court decision in the case Parker against Brown. . . .

I take it the Senator is apprehensive lest a statute passed by a State attempting to give validity to a private agreement to regulate would be recognized under this [decision]. I think it would not, because on page 351 of . . . Parker against Brown, I find this language from the Supreme Court:

> True, a State does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful (*Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47).

Therefore I have no doubt in my own mind that no State, under the terms of the conference report, could give authority to violate the Sherman antitrust law . . . .

13. 91 Cong. Rec. 1480 (1945):

Mr. O'MAHONEY:

There has never been any doubt . . . that private agreements by which these rates were enforced were violations and are violations of

the antitrust laws. There is nothing in the conference report that relieves insurance companies from the prohibition of the antitrust law, because there has been written back into the bill language which was taken out by the House which would have exempted agreements from the prohibition of the antitrust law. Therefore any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision.

14. 91 Cong. Rec. 1481 (1945):

Mr. FERGUSON:

Under the language which is now the bill as it appears in the conference report, if a State passes an act regulating insurance or taxing insurance, and that regulation is contrary to the Sherman Act or the Clayton Act, with three exceptions, then the State law would be the law. Here are the exceptions:

> Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

In other words, under the terms of the bill, there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate. But with respect to anything else, if the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding. That is exactly

what we attempted to do in the bill. It is clear what we intended to do. . . .

15. 91 Cong. Rec. 1483 (1945):

Mr. O'MAHONEY:

Mr. President, there are three forms of regulation. There is State regulation. . . . There is Federal regulation. . . .

The third, and this has been harmful to the public interest, is regulation by private combinations and groups . . . through private rules and regulations under which persons engaged in the insurance industry could be tried and convicted for the violation of private law. That type of regulation would be absolutely outlawed should the conference report be adopted.

16. 91 Cong. Rec. 1485 (1945):

Mr. O'MAHONEY:

The vice in the insurance industry, Mr. President, was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce. These private groups sought, by the imposition of penalties . . . to enforce not public regulations written by public authority but regulations for the insurance business which they wrote themselves in their wholly private and exclusive associations.

To me, Mr. President, this conference report represents a tremendous gain because it outlaws completely all steps by which small groups have attempted to establish themselves in control in the great interstate and international business of insurance.

. . . .

17. 91 Cong. Rec. 1486 (1945):

Mr. O'MAHONEY:

> Moreover, [the McCarran-Ferguson Act] . . . . [L]eaves the antitrust laws in full force and effect . . . against boycotts and agreements to boycott . . . . There are agreements and combinations . . . which ought to be outlawed, and which . . . would be completely outlawed. I refer to the prohibition against agreements to coerce or intimidate . . . .
>
> [T]he great gain which has been achieved by the complete agreement of the Senate and House conferees, to the effect that agreements as well as acts of boycott, coercion, and intimidation should be outlawed, is so distinctly in the public interest . . . .

18. 13 *Public Papers and Addresses of Franklin D. Roosevelt: 1944-45* 587 (Rosenman ed. 1950) (commentary of Pres. Roosevelt on signing into law the McCarran-Ferguson Act):

> It is clear from the legislative history and the language of this Act, that the Congress intended no grant of immunity for monopoly or for boycott, coercion, or intimidation. Congress did not intend to permit private rate fixing, which the Anti-trust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States.
>
> . . . .

[PLAINTIFF STATES' UNIFIED DISTRICT COURT BRIEF]

STATES' REGULATORY APPENDIX

Pursuant to Local Rule 220-7, the States submit this Regulatory Appendix ("Appendix") in opposition to Defendants' McCarran and State Action motions and in support of the States' Cross-Motion for Summary Judgment on State Action Grounds.

This Appendix identifies state insurance statutes relevant to the present litigation. It also identifies when there is no state statute addressing or regulating a particular conduct. Lastly, it briefly describes the process by which each State reviewed the 1986 ISO CGL forms.[1]

The Appendix is divided into eighteen parallel sections, one for each of the States responding to defendants' motions. Each section contains statutory material in support of the following propositions:

A. State statutes express an overall policy disfavoring collusion and favoring competition in the provision of insurance coverages;

B. State statutes specifically prohibit acts and agreements constituting boycott, coercion and intimidation;

C. State statutes pertaining to the review of insurance policy forms do not clearly articulate

[1] This Appendix does not, however, respond to every factual issue raised in defendants' filings with the Court. For example, on the basis of the Banfield Affidavit, Exhibit I, defendants contend that the State of Connecticut conducted two hearings on the ISO CGL forms. The States can offer affidavits demonstrating that Connecticut conducted no such hearings. In keeping with this Court's instructions that the parties avoid "papering" the record with unnecessary filings, the States have not responded to such immaterial (and erroneous) assertions. If the Court finds that such factual assertions are material and appropriate for consideration at this time, the States reserve their right to file opposing factual affidavits.

and affirmatively express an intention to displace competition regarding the availability or use of such forms;

D. State statutes pertaining to the filing of rates do not clearly articulate and affirmatively express an intention to displace competition regarding the availability of use of advisory rates; nor do they express such an intention regarding the availability or use of policy forms;

E. State statutes do not regulate the activities of reinsurers in any manner meaningful to the claims pleaded in the complaint;

F. State Unfair Trade Practices do not express an intention to displace competition regarding the development of policy forms or the use of such forms; and

G. State insurance departments did not determine whether defendants had engaged in anticompetitive conduct for the purpose of eliminating consumer-desired coverages.

* * * *

STATES' REGULATORY APPENDIX
STATE OF CALIFORNIA

A. CALIFORNIA STATUTES EXPRESS AN OVERALL POLICY DISFAVORING COLLUSION AND FAVORING COMPETITION IN THE PROVISION OF INSURANCE COVERAGES.

1. Cal. Ins. Code ch. 9, §§ 1850-1859.1, the McBride-Grunsky Act, establishes standards applicable to rates and rating organizations. The express purpose of the Act is "to permit and encourage competition between insurers [and not to] give the Commissioner power to fix and determine a rate level by classification or otherwise." Cal. Ins. C. § 1851(a).

B. CALIFORNIA STATUTES SPECIFICALLY PROHIBIT ACTS AND AGREEMENTS CONSTITUTING BOYCOTT, COERCION AND INTIMIDATION.

1. Cal. Ins. C. § 790.03(c) prohibits "Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance."

C. CALIFORNIA STATUTES PERTAINING TO INSURANCE POLICY FORMS DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF SUCH FORMS.

1. There are no provisions of California law concerning supervision or review of CGL forms. The filing of forms with the Insurance Commissioner is not required.

2. California has no statutes which address umbrella or excess liability coverage. The Insurance Code provides that when insurance coverage is not available from admitted insurers it may be procured from nonadmitted insurers through licensed surplus lines brokers. Forms used by surplus lines brokers are not subject to review or approval by the Insurance Commissioner.

D. CALIFORNIA STATUTES PERTAINING TO THE FILING OF RATES DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF ADVSORY RATES; NOR DO THEY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF POLICY FORMS.

1. Under the McBride-Grunsky Act, Cal. Ins. Code ch 9, Sections 1850-1859.1, insurers may act in concert with

one another on the making of rates or policy forms to the extent they do so as members of rating organizations. However, they are explicitly prohibited from agreeing to adhere to such rates or forms. Cal. Ins. C. § 1853.6. Further, the express purpose of the Act is to "encourage competition between insurers."

E. CALIFORNIA STATUTES DO NOT REGULATE THE ACTIVITIES OF REINSURERS IN ANY MATERIAL RESPECT.

1. California licensing statutes, which require admission of insurers for specified classes of insurance before they can transact such business, include no references to reinsurance as a specified class, or at all. Cal. Ins. C §§ 699 et seq. Those defendant domestic reinsurers actually holding certificates of authority to transact business in California do so as primary insurers.

2. There is no review or regulation of reinsurance rates, forms, or any of the terms or conditions on which reinsurance is sold. Reinsurance operations are expressly exempted from such regulation. Cal. Ins. C. § 1851(a).

F. CALIFORNIA'S UNFAIR INSURANCE PRACTICES ACT DOES NOT EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE DEVELOPMENT OF POLICY FORMS OR THE USE OF SUCH FORMS.

1. The California Unfair Practices Act, Cal. Ins. C. §§ 790 et seq., is a consumer-oriented statute directed primarily toward deceptive advertising, marketing and claim settlement practices and discrimination. § 790.03 ("Prohibited unfair or deceptive acts or practices"). The Act enunciates a general policy prohibiting trade practices which constitute "unfair practices in business of insurance". § 790.02.

2. Contrary to defendants' characterization, the Act does not provide for the "comprehensive regulation of

all types of insurance in California by the Commissioner of Insurance." Rather, the Act defines certain conduct (including boycott, coercion and intimidation) to be an unfair trade practice and establishes certain enforcement authority for the Insurance Commissioner to remedy those violations. The Commissioner may hold hearings, issue cease and desist orders, and obtain court orders against unfair practices. §§ 790.05-790.07. Until 1987 the maximum penalty for willful violation of such an order was $500. § 790.07.

The Act is not intended to relieve its violators of either civil or criminal liability under other laws. § 790.09.

3. To the extent the Act applies to anticompetitive conduct, it enunciates an intention to preserve, not displace, competition. The Act contains no provision which affirmatively expresses as state policy any intent to displace competition in the insurance industry.

G. [Intentionally left blank. See Section C above.]

* * * *

STATES' REGULATORY APPENDIX
STATE OF CONNECTICUT

A. CONNECTICUT STATUTES EXPRESS AN OVERALL POLICY DISFAVORING COLLUSION AND FAVORING COMPETITION IN THE PROVISION OF INSURANCE COVERAGES.

1. The Connecticut insurance code demonstrates an overall concern that the insurance market in Connecticut remain competitive. Conn. Gen. Stat. § 38-201dd constitutes a legislative finding that the purposes of, *inter alia*, §§ 38-201j(b) and 38-201(n) are as follows:

> (1) *To prohibit noncompetitive behavior by insurers*; (2) to protect policyholders and the public against the adverse effects of excessive, inadequate or unfairly discriminatory rates; (3) *to promote price competition among insurers so as to provide rates*

which are responsive to competitive market conditions; (4) to promote sufficient consumer activity in the marketplace in order to generate a regulatory effect on price; (5) to improve availability, fairness and reliability of insurance; (6) to authorize essential cooperative action among insurers in the rate-making process and to regulate such activity *to prevent practices that tend to substantially reduce competition or create a monopoly*; (7) to encourage the most efficient and economic marketing practices; (8) to provide price and other information to enable consumers to purchase insurance suitable for their needs and *to foster competitive insurance markets*; and (9) to provide the insurance commissioner with authority to impose regulatory controls in the event that the other purposes are not accomplished. (Emphasis added).

2. Members and subscribers of rating organizations "may use the . . . policy . . . form of such organizations, either *consistently* or *intermittently*, but, except as provided in §§ 38-201(e), 38-201(h), and 38-201j, *shall not agree with each other or rating organizations or others to adhere thereto.*" Conn. Gen. Stat. § 38-201(f). (Emphasis added).

3. § 38-201j(b) provides, *inter alia*, that in order

> To obtain and retain a license, a rating organization shall provide satisfactory evidence to the insurance commissioner that it will: . . . (2) neither have nor adopt any rule or exact any agreement, the effect of which would be to require any member or subscriber as a condition to membership or subscribership, to *adhere to its rates, rating plans, rating systems, underwriting rules, or policy or bond forms*; . . . (4) *neither practice nor sanction any plan or act of boycott, coercion or intimidation*; (5) neither enter into nor sanction any contract or act by which any person is restrained from lawfully engaging in the insurance business, ... (Emphasis added).

4. Connecticut law prohibits any person from engaging in unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. Conn. Gen. Stat. §§ 38-60 to 38-64.

5. Connecticut insurance statutes do not refer to the McCarran-Ferguson Act, nor does Connecticut's antitrust law contain an insurance exemption similar to the McCarran-Ferguson Act. Conn. Gen. Stat. §§ 35-24, *et seq.*, See Conn. Gen. Stat. § 35-31 (exemption).

B. CONNECTICUT STATUTES SPECIFICALLY PROHIBIT ACTS AND AGREEMENTS CONSTITUTING BOYCOTT, COERCION, AND INTIMIDATION.

1. Connecticut law defines "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance" to include, among other things, "boycott, coercion and intimidation" and prohibits any person from entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance. Conn. Gen. Stat. § 38-61(4).

2. Rating organizations are prohibited from practicing or sanctioning any plan or act of boycott, coercion, or intimidation by Conn. Gen. Stat. § 38-201j(b).

C. CONNECTICUT STATUTES PERTAINING TO THE REVIEW OF INSURANCE POLICY FORMS DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF SUCH FORMS.

1. The State of Connecticut reviews the contents of insurance policy forms through a file and use system. Connecticut law provides that "[t]he form of any insur-

ance policy or contract the rates for which are subject to the provisions of this chapter other than fidelity, surety or guaranty bonds, shall be filed with the insurance commissioner prior to its issuance." Conn. Gen. Stat. § 38-201n(c). Until 1988 the Commissioner did not possess the authority to adopt regulations for procedures to review such policies. "The commissioner shall adopt regulations . . . establishing a procedure for review of such policy or contract." 1988 Conn. Pub. Acts No. 88-326, § 6(c), effective October 1, 1988, amending Conn. Gen. Stat. § 38-201(n)(c).

2. By virtue of the adoption of 1987 Conn. Pub. Acts No. 87-133, the Connecticut Insurance Commissioner was granted authority to adopt regulations "to establish standards for insurance policies written on a claims-made basis." Effective May 18, 1987.

3. Until the adoption of 1987 Conn. Pub. Acts No. 87-133 the only standard contained in the Connecticut General Statutes for disapproval of forms for commercial risks was Conn. Gen. Stat. § 38-201c(a) which provides that "[r]ates shall not be *excessive or inadequate* . . . nor shall they be *unfairly discriminatory*." (Emphasis added).

4. The only specific reference to claims-made policies prior to the adoption of 1987 Conn. Pub. Acts No. 87-133 was Conn. Gen. Stat. § 38-370(c) which provides, with respect to *professional liability insurance only*, that:

> Every professional liability insurance policy issued on a claims-made basis delivered, issued for delivery or renewed in this state on or after October 1, 1978, shall contain (1) a provision for the purchase of prior acts coverage and (2) a contractual right of the insured to purchase at any time during the policy period and not later than thirty days after termination of such policy period equivalent coverage for all claims occurring during an insured policy period regardless of when made.

6. The reference by the Defendants to Conn. Ins. Comm. Bull. No. PF-2 (14 and 18) is *plainly* in error. The policy form disapproval list is applicable to *accident and health policies only*. There exists no such disapproval list applicable to CGL forms. The first specific CGL authority with respect to claims-made policies other than professional liability insurance was granted the insurance commissioner by virtue of 1987 Conn. Pub. Acts No. 87-133, effective May 18, 1987 for regulations to be adopted by April 1, 1988. Moreover, *all* P-F bulletins constitute insurance department summaries and/or lists of statutory and/or regulatory criteria. As such, P-F bulletins have no independent force of their own. Moreover, the statutory standards contained in P-F bulletins, by their very terms, are applicable only to *accident* and *health* forms.

D. CONNECTICUT STATUTES PERTAINING TO THE FILING OF RATES DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF ADVISORY RATES; NOR DO THEY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF POLICY FORMS.

1. Conn. Gen. Stat § 38-201j(b) provides, *inter alia*, that in order "[t]o obtain and retain a license, a rating organization shall provide satisfactory evidence to the insurance commissioner that it will: . . . (2) neither have nor adopt any rule or exact any agreement, the effect of which would be to require any member or subscriber as a condition to membership or subscribership, to *adhere to its rates, rating plans, rating systems, underwriting rules, or policy or bond forms*; . . . (4) *neither practice nor sanction any plan or act of boycott, coercion or intimidation*, (5) neither enter into nor sanction any contract or act by which any person is restrained from

lawfully engaging in the insurance business; . . . ." (Emphasis added).

E. CONNECTICUT STATUTES DO NOT REGULATE THE ACTIVITIES OF REINSURERS IN ANY MANNER MEANINGFUL TO THE CLAIMS PLEADED IN THE COMPLAINT.

1. Connecticut law provides that no provision of law relative to the form of insurance contracts or policies shall apply to contracts of *reinsurance* unless made *specifically* applicable thereto. Conn. Gen. Stat. § 38-28. Moreover, Connecticut law specifically exempts reinsurance, other than joint reinsurance, to the extent stated in § 38-2011, from all commercial risk insurance rating practices. Conn. Gen. Stat. §§ 38-201(a) to 38-201(s).

2. Conn. Gen. Stat. §§ 38-110, 233 and 452 do not 'regulate' reinsurers' conduct at all. Rather each statute governs an aspect of reinsurance contracts: § 38-452—a reinsurance contract cannot reduce the amount recoverable by the liquidator from reinsurers as a result of delinquency proceedings; § 38-110—reinsurance shall not be included in the amount of total exposure by stock or mutual fire insurance companies to determine ten percent of paid-up capital and surplus (stock), or net surplus and two and a half times its total cash premiums or premium deposits in force (mutual); § 38-233—a domestic society may cede risks to a reinsurer.

F. THE CONNECTICUT UNFAIR INSURANCE PRACTICES ACT (CUIPA) DOES NOT EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE DEVELOPMENT OF POLICY FORMS OR THE USE OF SUCH FORMS.

1. The Connecticut Unfair Insurance Practices Act, Conn. Gen. Stat. §§ 38-60 to 38-64 ("the Act"), is a consumer-oriented statute directed primarily towards deceptive advertising, marketing and claim settlement practices and discrimination. The Act enunciates a general policy prohibiting trade practices which constitute "unfair methods of competition."

2. Contrary to defendants' characterization, the Act does not provide for the "comprehensive regulation of all types of insurance in Connecticut." Rather the Act defines certain conduct (including boycott, coercion and intimidation, Conn. Gen. Stat. § 38-61(4).) to be an unfair method of competition and establishes certain enforcement authority for the insurance commissioner to remedy violations. However, the remedial authority established by the Act is not exclusive; rather, the Act expressly preserves as available remedies all other authority applicable to such conduct:

> No order of the Commissioner under Conn. Gen. Stat. §§ 38-60 to 38-64, inclusive, shall relieve or absolve any person affected by such order from any liability under any other laws of this state. Conn. Gen. Stat. § 38-62(d). See *Mead v. Burns*, 199 Conn. 651, 661, 509 A.2d 11 (1986).

3. To the extent the Act applies to anticompetitive conduct, it enunciates an intention to preserve, not displace competition. Thus, the Act contains no provision that affirmatively expresses as state policy any intent to displace competition in the insurance industry.

G. THE CONNECTICUT INSURANCE COMMISSIONER DID NOT DETERMINE WHETHER DEFENDANTS HAD ENGAGED IN ANTICOMPETITIVE CONDUCT FOR THE PURPOSE OF ELIMINATING CONSUMER-DEMANDED COVERAGES.

1. The Connecticut Commissioner's Notice of Decision dated December 31, 1985 concerning ISO's proposed claims-made form did not address any conduct of the defendants. The Commissioner's decision also expressly did not address the ISO occurrence form which had been

filed contemporaneously with the claims made form. The decision was limited to an evaluation of the claims-made trigger only, and did not address other aspects of the claims-made form such as the pollution exclusion.

2. By virtue of the adoption of 1987 Conn. Pub. Acts No. 87-133, the Connecticut Insurance Commissioner was granted authority to adopt regulations "to establish standards for insurance policies written on a claims-made basis." Effective May 18, 1987.

3. Until the adoption of 1987 Conn. Pub. Acts No. 87-133 the only standard contained in the Connecticut General Statutes for disapproval of forms for commercial risks was Conn. Gen. Stat. § 38-201c(a) which provides that "[r]ates shall not be *excessive or inadequate* . . . nor shall they be *unfairly discriminatory*." (Emphasis added).

4. The only specific reference to claims made policies prior to the adoption of 1987 Conn. Pub. Acts No. 87-133 was Conn. Gen. Stat. § 38-370(c) which provides with respect to *professional liability insurance only*, that:

> Every professional liability insurance policy issued on a claims-made basis delivered, issued for delivery or renewed in this state on or after October 1, 1978 shall contain (1) a provision for the purchase of prior acts coverage and (2) a contractual right of the insured to purchase at any time during the policy period and not later than thirty days after termination of such policy period equivalent coverage for all claims occurring during an insured policy period regardless of when made.

5. Thus, the Insurance Commissioner of Connecticut was without authority, using as his basis Conn. Gen. Stat. § 38-370(c), to disapprove the 1984 CGL Form (GL 84-084(c)) and without authority to supervise review of the Claims-Made Form submitted for his consideration.

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STATES' REGULATORY APPENDIX
STATE OF MONTANA

A. MONTANA STATUTES EXPRESS AN OVERALL POLICY DISFAVORING COLLUSION AND FAFORING COMPETITION IN THE PROVISION OF INSURANCE COVERAGES.

1. The Montana Insurance Code demonstrates an overall concern that the insurance market in Montana remain competitive. Section 33-18-102(1), MCA, provides that "[n]o person shall engage in this state in any trade practice which is defined in this chapter as or determined pursuant to this chapter to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."

2. The legislative intent to foster competition in the insurance industry in Montana appears in other areas of the Montana Insurance Code as well. For example, Section 33-18-304, MCA, provides that insurers may acquire capital stock of other insurers or engage in common management of other insurers unless such acquisition, investment, retention or common management "is conducted in a manner which substantially lessens competition generally in the insurance business or tends to create a monopoly therein." Section 33-18-304(1), MCA. This statute also provides that a qualified person may be a director of two or more competing insurers "unless the effect thereof is to lessen substantially competition between insurers generally or tends materially to create a monopoly." Section 33-18-304(2), MCA. Other statutes in the Montana Insurance Code evince a similar legislative intent to foster competition. These include the following:

> Section 33-2-1105, MCA:
>
> (1) The commissioner shall approve any merger or other acquisition of control [of a domestic insurer] unless . . .

(b) the effect of the merger or other acquisition of control would be substantially to lessen competition in insurance in this state or tend to create a monopoly therein.

Section 33-16-201, MCA:

The following standards shall apply to the making and use of rates pertaining to all classes of insurance to which the provisions of this chapter are applicable:

(1)(a) Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory.

(b) no rate shall be held to be excessive unless such rate is unreasonably high for the insurance provided and a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable.

(c) no rate shall be held to be inadequate . . . unless such rate is unreasonably low for the insurance provided and the use of such rate by the insurer using same has, or if continued will have, the effect of destroying competition or creating a monopoly.

B. MONTANA STATUTES SPECIFICALLY PROHIBIT ACTS AND AGREEMENTS CONSTITUTING BOYCOTT, COERCION, AND INTIMIDATION.

Section 33-18-303, MCA, provides that "[n]o person shall enter into any agreement to commit or by any concerted action commit any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of or monopoly in the business of insurance."

C. MONTANA STATUTES PERTAINING TO THE FILING OF INSURANCE POLICY FORMS DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF SUCH FORMS.

1. Montana Code Ann. Section 33-1-501 *et seq.*, establishes general requirements regarding the use of policy forms in Montana. It provides that: "[n]o insurance policy . . . shall be delivered or issued for delivery in this state unless the form has been filed with and approved by the commissioner of this state." Section 33-1-501(1). Forms must be filed not less than sixty days prior to delivery. The Commissioner may "affirmatively approve or disapprove" the forms during the sixty-day period. Section 33-1-501(2).

2. The Commissioner is authorized to disapprove a form if it "contains or incorporates by reference . . . any inconsistent, ambiguous, or misleading clauses or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract," or if it contains a misleading title. Mont. Code Ann. Section 33-1-502(1-4).

3. Neither Sections 33-1-501 *et seq*, nor any other statute clearly articulates and affirmatively expresses any intention to displace competition regarding the availability or use of such forms.

D. MONTANA STATUTES PERTAINING TO THE FILING OF RATES DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF ADVISORY RATES; NOR DO MONTANA STATUTES EXPRESS AN INTENTIÓN TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF POLICY FORMS.

1. The statement of purpose and intent found at the beginning of Chapter 16, which governs rate-making, provides that:

> It is the express intent of this chapter to permit and encourage competition between insurers on a sound financial basis, and nothing in this chapter is intended to give the commissioner power to fix and determine a rate level by classification or otherwise. (emphasis added)

2. Section 33-16-303(1), MCA, contains the following prohibition against anti-competitive conduct:

> Members and subscribers of rating or advisory organizations may use the rates, rating systems, underwriting rules, or policy or bond forms of such organizations, either consistently or intermittently, but, except as provided in Sections 33-16-105, 33-16-302, 33-16-305, 33-16-307, and 33-16-1005 shall not agree with each other or rating organizations or others to adhere thereto.

(Emphasis added).

3. Insurers and rating organizations are required to file rates intended for use in Montana with the Commissioner, and the required filing may be made by a rating organization on behalf of its members and subscribers. However, the right of independent action is guaranteed to individual insurers by Section 33-16-203, MCA, which

provides that a member or subscriber to a rating organization may file any such rates on its own behalf as well.

E. MONTANA STATUTES DO NOT REGULATE REINSURERS IN ANY MANNER MEANINGFUL TO THE CLAIMS PLEADED IN THE COMPLAINT.

1. In Montana, reinsurers (including retrocessional reinsurers) are not subject to rate or form review. Section 33-1-501(6)(a), MCA and Section 33-16-103, MCA. The Montana Insurance Commissioner has no authority to review or regulate the product which reinsurer's sell, its price, or the terms and conditions on which it is sold.

2. Nor are reinsurers subject to licensing requirements, unless they are incorporated in Montana. Section 33-2-102, MCA explicitly exempts reinsurance from those transactions which require a certificate of authority. Although several defendant reinsurers have chosen to become licensed in Montana, they are not required to do so in order to sell reinsurance.

3. Section 33-2-101, MCA, cited by defendants for the proposition that reinsurers "may become subject to regulation under licensing or authorization statutes," simply requires an insurer to obtain a certificate of authority in order to transact insurance in Montana. As noted above, Section 3102, MCA explicitly exempts reinsurance from this requirement.

4. Defendant's reference to Sections 33-2-106, 33-2-109 to 33-2-112 and 33-2-115, MCA (Defendant's State-by-State Appendix at 100) is misleading, since none of those statutes purports to authorize the Commissioner to specifically regulate reinsurance, nor do any of those states require reinsurers to obtain a certificate of authority to conduct reinsurance business in Montana.

5. Sections 33-2-1205, 33-2-1206, 33-2-1211 and 33-2-1212, MCA, regulate the use of reinsurance in certain

instances by primary insurers. These statutes do not regulate reinsurers, as defendants imply. (Defendant's State-by-State Appendix at 100.) In fact, other provisions of the Montana Insurance Code which mention reinsurance are provisions which specifically exempt reinsurance from regulation. Section 33-2-317, MCA, for example, specifically exempts reinsurance from state regulation of surplus lines insurance.

6. None of the above-cited provisions, nor any other statute in Montana, "regulates" reinsurance transactions in the State of Alabama in any manner meaningful to the claims pleaded in the complaints.

F. MONTANA'S UNFAIR PRACTICES CHAPTER OF ITS INSURANCE STATUTES DOES NOT EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE DEVELOPMENT OF POLICY FORMS OR THE USE OF SUCH FORMS.

1. The Montana Unfair Practices Chapter of its insurance code ("the Act") is a consumer-oriented statute directed primarily towards deceptive advertising, marketing and claim settlement practices and discrimination. The Act enunciates a general policy prohibiting trade practices which constitute "an unfair method of competition." Section 33-18-102(1), MCA.

2. Contrary to defendants' characterization, the Act does not provide for the "comprehensive regulation of all types of insurance in Montana." Rather, the Act defines certain conduct (including boycott, coercion, and intimidation) to be an unfair trade practice and establishes certain enforcement authority for the insurance commissioner to remedy these violations. However, the remedial authority established by the Act is not exclusive; rather, the Act expressly preserves as available remedies all other state and federal authority applicable to such conduct.

> Section 33-18-1004(4) No order of the commissioner pursuant to this section or order of court to enforce it shall in any way relieve or absolve any person affected by such order from any other liability, penalty, or forfeiture under law.
>
> Section 33-18-1004(5) This section shall not be deemed to affect or prevent the imposition of any penalty provided by this code or by other law for violation of any other provision of this chapter, whether or not any such hearing is called or held or such desist order issued.

Further the administrative rules promulgated by the Commissioner in implementing the enforcement provisions of the unfair trade practices law provide that:

> These rules are not exclusive. . . . The rights provided by these rules are in addition and do not prejudice any other rights the policyholder may have at common law, under statutes or other Administrative Rules of Montana.

Section Section 6.6.2001(3), Administrative Rules of Montana.

G. [Intentionally left blank]

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STATES' REGULATORY APPENDIX
STATE OF NEW YORK

A. NEW YORK STATUTES EXPRESS AN OVERALL POLICY DISFAVORING COLLUSION AND FAVORING COMPETITION IN THE PROVISION OF INSURANCE COVERAGES.

1. New York law pertaining to property and casualty insurance, including CGL insurance, specifically includes, among its purposes, the promotion of "price competition and competitive behavior among insurers . . ." New York Ins. Law 2301.

2. New York law grants a private right of action for treble damages and injunctive relief to "[a]ny person injured in his business or property" by reason of any prohibited anticompetitive conduct in connection with the sales of property/casualty insurance. New York Ins. Law, 2316(b)(2) and (3).

3. The superintendent, through the Attorney General, may also maintain an action to enjoin any such anticompetitive conduct. New York Ins. Law 2316(b)(2). New York law provides for concurrent administrative enforcement of these prohibitions of anticompetitive conduct. *See* New York Ins. Law 2320(c).

B. NEW YORK STATUTES PROHIBITS ACTS AND AGREEMENTS CONSTITUTING BOYCOTT, COERCION AND INTIMIDATION.

Prohibited anticompetitive conduct under New York Ins. Law, 2316(b)(2) and (3), above, includes agreements among insurers or rate service organizations to refuse to deal in connection with the sale of such insurance, agreements or attempts to monopolize, agreements the effect of which may be substantially to lessen competition, and agreements in restraint of trade. New York Ins. Law 2316(a). This language would, of course, prohibit acts constituting boycott, coercion and intimidation.

C. NEW YORK STATUTES PERTAINING TO THE REVIEW OF INSURANCE POLICY FORMS DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF SUCH FORMS.

1. New York Ins. Law 2307(b) establishes general requirements regarding the use of policy forms in New York. It provides that "[n]o policy form shall be delivered or issued for delivery unless it has been filed with the superintendent and either he has approved it or thirty

days have elapsed and he has not disapproved it as misleading or violative of public policy."

2. The superintendent may disapprove proposed policy forms if they are "misleading or violative of public policy." Section 2307(b).

3. Policy forms to be used in connection with umbrella and excess liability coverages are generally required to be filed pursuant to Section 2307(b) only when written by insurers licensed in New York. Under New York law, such coverages, as well as other commercial liability coverages, may be sold by insurers not licensed in New York when such coverages are unobtainable in whole or in part from insurers licensed in New York. 11 New York Code Rule and Regulations § 27.0(a) (Regulation 41); New York Ins. Law ¶ 2118. Policy forms used or rates charged in connection with such coverages when written by non-licensed insurers are generally not subject to filing with or review by state insurance officials.

D. NEW YORK STATUTES PERTAINING TO THE FILING OF RATES DO NOT CLEARLY ARTICULATE AND AFFIRMATIVELY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF ADVISORY RATES; NOR DO THEY EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE AVAILABILITY OR USE OF POLICY FORMS.

1. New York law permits the operation of rate service organizations. New York Ins. Law § 2313(a). A rate service organization is defined, in pertinent part, as a "person or . . . entity which makes or files rates as permitted by this article, or which assists insurers in rate making or filing by collecting, compiling, and furnishing loss or expense statistics, or by recommending rates or rate information. . . It shall include a person or entity

which prepares and files policy forms and endorsements on behalf of insurers." *Id.*

2. New York law also permits "[c]ooperation among rate service organizations or among rate service organizations and insurers in rate making or in other matters within the scope of this article", including form-making, "provided that the filing resulting from such cooperation is subject to all the provisions of this article which are applicable to filings generally." New York Ins. Law § 2313(O).

3. Nothing contained in relevant New York law requires "any insurer to become a member of or a subscriber to any rate service organization," or prevents "any insurer, while a member of or subscriber to a rate service organization, from making it's own rates for any kind, subdivision or class of insurance, for which it does not elect to authorize the rate service organization to act on its own behalf." New York Ins. Law § 2316(a). Moreover, under New York Law, "[n]o rate service organization shall have authority to act on behalf of any insurer which is a member of or subscriber to such rate service organization," except as authorized in writing by such member of subscriber to do so. New York Ins. Law § 2316(a)(10). Such authority may be "supplemented, modified or revoked, in whole or in part, at any time by such member or subscriber at its option." *Id.*

4. New York law prohibits any insurer or rate service organization from making "any agreement with any other insurer or rate service organization to refuse to deal with any person in connection with the sale of insurance." New York Ins. Law, § 2316(a)(6).

5. New York law also prohibits any rate service organization or member or subscriber thereof from interfering "with the right of any insurer to make its rates independently of such rate service organization or to

charge rates different from the rates made by such rate service organization." New York Ins. Law, § 2316(a)(7).

6. New York law also forbids any rate service organization to "have or adopt any rule, or enact any agreement, or formulate or engage in any program, the effect of which would be to require any member, subscriber or other insurer to utilize some or all of its ratings service, or to adhere to its rates, rating plans, rating systems, underwriting rules, or policy forms, or to prevent any insurer from acting independently." New York Ins. Law, § 2316(a)(11).

E. NEW YORK STATUTES DO NOT REGULATE THE ACTIVITIES OF REINSURERS IN ANY MANNER MEANINGFUL TO THE CLAIM PLEADED IN THE COMPLAINT.

1. Article 23 of the New York Insurance Law applies generally to property/casualty insurance written on risks or operations in New York by an insurer authorized to do business in New York. New York Ins. Law § 2302(a). Reinsurance, with exceptions not relevant here, is specifically exempted from Article 23's statutory scheme relating to direct property/casualty insurance. New York Ins. Law, § 2302(a)(1). Accordingly, under New York law, policy forms used or rates charged in connection with reinsurance coverages for commercial liability risks are generally not subject to prior filing with or review by state insurance officials.

2. New York law provides that "[n]o person, firm, association, corporation or joint-stock company shall do an insurance business in this state unless authorized by a license in force pursuant to the provisions of this chapter. . . New York Ins. Law 1102(a) "Doing an insurance business" is defined to include the doing of any "reinsurance business." New York Ins. Law 1101(b)(1)(d). However, New York law also provides that the reinsurance of risks of authorized insurers, if effected

by mail from outside New York by an unauthorized foreign or alien insurer licensed under the laws of its domicile, shall not constitute doing an insurance business in New York. New York Ins. Law 1101(b)(2)(0).

3. Underwriters at Lloyd's of London, including defendants Merrett Underwriting Agency Management Limited (s/h/a Merrett Underwriting Agencies Mgt., Ltd.), Three Quays Underwriting Management Limited (s/h/a Three Quays Underwriting, Ltd.), Janson Green Management Limited (s/h/a Janson Green, Ltd.), (C.J.W.) (Underwriting Agencies) Limited (s/h/a C.J. Warrilow-Hine & Butcher, Ltd.), Murray Lawrence & Partners), Edwards & Payne (Underwriting Agencies) Limited (s/h/a Edwards and Payne Management (U.A.), Ltd.), Oxford Syndicate Management Ltd. (s/h/a K.F. Alder & Others, (U.A.) Ltd.), and D.P. Mann Underwriting Agency Limited (s/h/a D.P. Mann & Others (U.A.), Ltd.), are not currently and at all relevant times were not licensed or authorized to do any insurance business in New York.

Defendant Unionamerica Insurance Company, Ltd. is not currently and at all relevant times was not licensed or authorized to do any business in New York.

Defendant Nova Insurance Company, Ltd., is not currently and at all relevant times was not licensed or authorized to do any insurance business in New York.

Defendant Excess Insurance Company, Ltd., s/h/a Excess Insurance Group, Ltd., is not currently and at all relevant times was not licensed or authorized to do any insurance business in New York.

Defendant Kemper Reinsurance London, Ltd. is not currently and at all relevant times was not licensed or authorized to do any insurance business in New York

Defendant Continental Reinsurance (Corporation (U.K.) is not currently and at all relevant times was not licensed or authorized to do any insurance business in New York.

Defendants CNA Re (U.K.), Ltd. is not currently and at all relevant times was not licensed or authorized to do any insurance business in New York.

4. Non-licensed reinsurers may qualify as "accredited reinsurers" if they are in compliance with solvency standards and other applicable regulation. New York Ins. Law § 107(a)(2) provides that reinsurance obligations of such accredited reinsurers to primary insurers are generally deemed to be assets of primary insurers for purpose of detemining the solvency and financial condition of such primary insurers. New York Ins. Law ¶ 1301(a)(14).

F. NEW YORK'S UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE ACTS AND PRACTICES ACT DOES NOT EXPRESS AN INTENTION TO DISPLACE COMPETITION REGARDING THE DEVELOPMENT OF POLICY FORMS OR THE USE OF SUCH FORMS.

1. Article 24 of the New York Insurance Law is intended (1) to define or provide for the determination of all trade practices in the business of insurance "which constitute unfair methods of competition or unfair or deceptive acts or practices", and (2) to prohibit such practices.

2. Article 24 provides that "[n]o person shall engage in this state in any trade practice constituting a defined violation or a determinated violation as defined herein." New York Ins. Law § 2403. "Person" is defined in pertinent part as "any legal entity subject to any provision of this chapter, engaged in the business of insurance in this state. . ." New York Ins. Law § 2402(a). Article 24 further provides that "[n]o order of the superintendent

[regarding any trade practice constituting a defined or a determined violation] or order of a court to enforce the same shall in any way relieve any person affected by the order from any liability under any other law." New York Ins. Law § 2409(b).

G. THE NEW YORK DEPARTMENT OF INSURANCE DID NOT DETERMINE WHETHER DEFENDANTS HAD ENGAGED IN ANTICOMPETITIVE CONDUCT FOR THE PURPOSE OF ELIMINATING COVERAGES FOR CONSUMER-DEMANDED COVERAGES.

1. ISO's claims-made and occurrence policy forms were initially filed with the New York State Insurance Department on March 13, 1984. Amendments to the policy forms, including the insertion of a retroactive date provision in the claims-made form, and the elimination of virtually all pollution coverage from both forms, were filed on, among other dates, December 5, 1984, and February 14, 1985.

2. On October 11, 1985, the New York Superintendent of Insurance disapproved ISO's claims-made CGL policy form on the grounds that "(a) it would be misleading to insurers and the public, and (b) its widespread use in the standard CGL policy form would be violative of public policy." Opinion and Decision dated October 11, 1985. By letter dated March 21, 1985, (Exhibit 121 to defendants' State-by-State Appendix), the Superintendent approved ISO's occurrence CGL policy form as re-submitted by ISO under cover of a letter dated March 17, 1986 (Exhibit 120 to defendants' State-by-State Appendix).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C-88-1688-WWS
(All Cases)

IN RE INSURANCE ANTITRUST LITIGATION

MEMORANDUM IN SUPPORT OF MOTION OF PLAINTIFF STATES TO VACATE JUDGMENT, OR IN THE ALTERNATIVE TO ALTER JUDGMENT TO GRANT LEAVE TO REPLEAD, OR IN THE ALTERNATIVE TO VACATE JUDGMENT TO PERMIT DISCOVERY

[Filed Oct. 5, 1989]

[Memorandum omitted]

ATTACHMENT A

PROFFERED FACTS

If granted leave to amend, the States would add, among others, the allegations described in the following synopsis.

I. *Property Pollution and Casualty Pollution Markets Are Interrelated*

(*See* Order at 40, lines 21-23)

A. Insurers and reinsurers that write casualty insurance or reinsurance also write property insurance or reinsurance.

B. Once defendants successfully eliminated pollution coverage from casualty insurance markets, the likelihood existed that pollution damage and injury claims would be shifted instead to property policies containing pollution coverage.

C. Consequently, defendants' conspiracy to eliminate all pollution insurance products would not succeed unless property pollution products, as well as casualty pollution products, were eliminated.

II. *Withdrawal of ISO Support for 1973 ISO CGL Forms*

(*See* Order at 25, lines 17-20.)

A. In furtherance of the conspiratorial goal of eliminating pollution and other long tail risk products from the market, insurer members of certain influential ISO committees, including defendants Aetna, CIGNA and Hartford, agreed to withdraw all support for the 1973 CGL form and to boycott insurers that needed the support in order to continue to offer products written on those forms.

B. ISO support was and is essential for the vast majority of insurers to continue to offer products written on the 1973 form.

C. On July 1, 1987, pursuant to this agreement, ISO officially withdrew its support of the 1973 CGL form.

D. Many insurance consumers preferred the products provided in the 1973 CGL form at the time support was discontinued, and actively resisted the withdrawal of such products.

E. The 1973 form has been, and continues to be, approved or accepted for use in various states.

F. Insurers other than defendants wanted to provide to consumers the products embodied in the 1973 forms. Defendants' support withdrawal, however, has prevented insurers from offering those products and has severely limited or eliminated those products from insurance markets.

III. *Boycott Allegations*

(*See* Order at 10, lines 6-7, 11, lines 3-4)

Defendants' conduct alleged in the Sixth and Seventh Claims for Relief in the First Wave Complaints and Fourth and Sixth Claims for Relief in the Second Wave Complaints constitute agreements or acts of boycott, coercion or intimidation or both.

IV. *Economic Motivation of Defendants*

A. Both primary insurers and reinsurers had economic motivations for engaging in the acts of boycott, coercion, or intimidation that are alleged in the complaints.

B. Defendant primary insurers engaged in such acts and entered into such agreements because, had they not done so, their rivals would have used the boycotted products as "door openers" to lure away customers. By forcing a market-wide elimination of the boycotted products, the defendant insurers were able to cease offering the products without risk of losing market share to firms that continued to offer them.

C. Defendant reinsurers engaged in such acts and entered into such agreements because doing so enabled them to prevent insurers from offering the boycotted products. Competition among reinsurers to provide reinsurance for insurers that wanted to offer the boycotted products was effectively eliminated.

V. *Comity Factors*

(*See* Order at 47-55)

A. Various defendants, although based in London, are owned and controlled, in whole or by majority interest, by United States corporations.

1. Defendants Terra Nova Insurance Co., Ltd.; Excess Insurance Company Limited; CNA Re (U.K.), Ltd.;, Kemper Re (U.K), Ltd.; Unionamerica Insurance Co., Ltd. and Continental Reinsurance Co. (U.K.), Ltd. all are owned and controlled by United States corporations, including defendants Aetna and CIGNA, and the parent corporation of defendant Hartford.

B. Substantially all of the effects alleged in the complaint occurred principally or exclusively in the United States.

C. Each defendant named in the Second, Third and Fourth claims for relief in the Second Wave (Connecticut-style) complaints, and in the First through Sixth Claims for Relief in the First Wave (California-style) complaints, intended by its anticompetitive actions to harm or affect, and in fact did harm and affect, United States commerce.

D. Lloyd's syndicates participate actively in the American economy, and their activities have a significant effect on United States commerce.

1. United States risks comprise the vast majority of the Lloyd's market for North American risks.

2. The United States market is the largest market for Lloyd's, and is almost double the size of any other Lloyd's market.

3. Approximately half of Lloyd's casualty business is written on United States risks.

4. Lloyd's is the largest reinsurer of United States business.

5. Lloyd's maintains a trust fund of at least $9,400,000,000 in the United States.

E. The London defendants engaged in numerous acts in the United States that were critical to the success of the boycotts, including private meetings with other defendants and public appearances in various forums to convey the threat of a reinsurance boycott unless consumer-demanded coverages were eliminated.

F. Eliminating the anticompetitive activity alleged in the complaints from Lloyd's and the London Company Market will not disrupt operations in those markets.

6. Both operate on the principle of free competition.

7. Neither market customarily condones boycotts.

8. Advance agreements among reinsurers binding them to underwrite only on specified terms, or to refuse to underwrite at all, without room for contrary individual decisions, is inconsistent with the custom and practice in both markets.

G. In both Lloyd's and in the London Company Market, ultimate reinsurance decisions are customarily made by individual underwriters responding to the circumstances of an individual transaction. Such decisions customarily are not imposed by market-wide agreements which divest individual underwriters of independent discretion.

VI. *Collective Forms Development Is Independent of Individual Underwriting Decisions.*

(*See* Order at 26, lines 12-14)

Participation in collective forms development does not imply that participants would also reach agreements on what coverage products each would offer in the market. Insurers responding to competitive forces often will offer coverage products that are not included in standard forms, provided that they are not denied access to reinsurance for such products or other essential services necessary to offer such products effectively.

VII. *Product Definitions*

A. Coverage for pollution liability is a product separate and distinct from coverage for other forms of liability. Coverage for other forms of liability is not a substitute for coverage for pollution.

B. Each coverage component of CGL coverage is a product separate and distinct from other coverage components.

C. Occurrence coverage and claims-made coverage are different products. Claims-made coverage is not a substitute for occurrence coverage because it does not supply any tail coverage, the most valuable component of occurrence coverage.

VIII. *Occurrence Boycott*

A. Insurers other than defendants wanted to continue to offer occurrence CGL products to consumers.

B. Defendants' collusive withdrawal of reinsurance for occurrence coverage was intended to prevent primary insurers from offering occurrence coverage to consumers.

1976 No. 98

FAIR TRADING

The Restrictive Trade Practices (Services) Order 1976

Laid before Parliament in draft

Made — — — — 26th January 1976

Coming into Operation 22nd March 1976

Whereas a notice has been published by the Secretary of State complying with the terms of section 111(2) of the Fair Trading Act 1973 [a] (hereinafter referred to as "the Act of 1973") and all the representations made with respect thereto have been taken into consideration:

And whereas a draft of this Order has been laid before Parliament and approved by resolution of each House of Parliament:

Now, therefore, the Secretary of State in exercise of powers conferred on her by sections 107 and 110 of the Act of 1973 hereby makes the following Order:—

1.—(1) This Order may be cited as the Restrictive Trade Practices (Services) Order 1976 and shall come into operation on 22nd March 1976.

(2) The Interpretation Act of 1889 [b] shall apply for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

2.—(1) The services brought under control by this Order are all services without exception.

(2) The services described in this Order as designated services are all services except those described in Schedule 4 to the Act of 1973.

[a] 1973 c. 41.

[b] 1889 c. 63.

3.—(1) It is directed that, subject to the provisions of Part X of the Act of 1973, the agreements to which Part I of the Restrictive Trade Practices Act 1956 [c] applies shall include agreements (whether made before or after the passing of the Act of 1973 and whether before or after the making of this Order) which—

(a) are agreements between two or more persons carrying on business within the United Kingdom in the supply of services brought under control by this Order, or between two or more such persons together with one or more parties, and

(b) are agreements under which restrictions, in respect of the matters specified in paragraph (2) below for the purposes of section 107(1)(*b*) of the Act of 1973, are accepted by two or more parties, and

(c) are not agreements described in the Schedule hereto.

(2) The matters specified for the purposes of the said section 107(1)(*b*) are the following, that is to say—

(a) the charges to be made, quoted or paid for designated services supplied, offered or obtained;

(b) the terms or conditions on or subject to which designated services are to be supplied or obtained;

(c) the extent (if any) to which, or the scale (if any) on which, designated services are to be made available, supplied or obtained;

(d) the form or manner in which designated services are to be made available, supplied or obtained;

(e) the persons or classes of persons for whom or from whom, or the areas or places in or from

[c] 1956 c. 68.

which, designated services are to be made available or supplied or are to be obtained.

Alan Williams,
Minister of State,
Department of Prices and Consumer Protection.

26th January 1976.

SCHEDULE

1. For the purposes of determining whether any agreement to which such an association as is mentioned in section 112 of the Act of 1973 is a party falls within a paragraph of this Schedule—

(a) if the association does not carry on business in the supply of the relevant service or belong to the relevant class of persons, but represents persons who do, it shall be deemed to carry on such a business or belong to that class; and

(b) there shall be disregarded any person who does not carry on the relevant business or belong to the relevant class and who is a party to the agreement by virtue only of the operation of that section.

2.(1) An agreement to which the only parties are operators of international sea transport services and the only restrictions accepted thereunder are in respect of such services.

(2) An agreement to which the only parties are such operators and persons for whom such services are being supplied and the only restrictions accepted thereunder are in respect of such services so far as those services relate to goods.

(3) An agreement to which the only parties are operators of international sea transport services and one other person carrying on business in the supply of another service and the only restrictions accepted under the agreement relate to the supply or acquisition of that other service in connection with the operation of international sea transport services.

(4) In this paragraph "international sea transport services" means the international carriage of passengers or goods wholly or partly by sea; and where the carriage is not wholly by sea, the carriage by sea and the carriage otherwise than by sea form part of the same service.

3.—(1) An agreement to which the only parties are air transport undertakings and the only restrictions accepted thereunder are in respect of carriage by air.

(2) An agreement entered into between an air transport undertaking and its agent and the only restrictions accepted thereunder are accepted in pursuance of such an agreement as is described in (1) above.

(3) In this paragraph "air transport undertaking" shall have the same meaning as in the Air Navigation Order 1974 [a].

4.—(1) An agreement to which the only parties are road passenger transport operators, and the only restrictions accepted thereunder relate to the provision of stage carriages or express carriages or both.

(2) For the purposes of this paragraph "stage carriage" and "express carriage" shall have the meaning given those expressions by sections 117 and 118 of the Road Traffic Act 1960 [b].

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[a] S.I. 1974/1114 (1974 II, p. 4057).

[b] 1960 c. 16.

5.—(1) An agreement entered into between the Treasury or both the Treasury and the Secretary of State and building societies and the only restrictions accepted thereunder relate to the raising of funds or the making of loans.

(2) An agreement to which the only parties are building societies and the only restrictions accepted thereunder are accepted in pursuance of such an agreement as is described in (1) above.

(3) An agreement to which the only parties are building societies, and the only restrictions accepted thereunder relate to the rates of interest charged or to be charged for loans, or to the rates of interest paid or to be paid to shareholders or depositors.

(4) In this paragraph a "building society" means a society incorporated under the Building Societies Act 1962 [c] or any enactment repealed by that Act (and includes a Northern Ireland society defined in section 134 of that Act).

6. An agreement to which the Bank of England or the Treasury or both the parties and which relates exclusively to the exercise of control by the Bank of England and the Treasury or one of them, as the case may be, over financial institutions or over the monetary system generally, or to the conduct of markets in money, in public sector debt instruments or in foreign currencies.

7. An agreement to which the only parties carry on business in the supply of banking services and the only restrictions accepted thereunder relate to the supply of such services in Northern Ireland, or in Northern Ireland and the Republic of Ireland.

[c] 1962 c. 37.

8. An agreement to which the only parties are persons permitted by or under Part I of the Insurance Companies Act 1974 [a] or Part II of the Insurance Companies Act (Northern Ireland) 1968 [b] to carry on Insurance business and the only restrictions accepted thereunder relate to the provisions of insurance services.

9. An agreement to which the only parties are trustees or managers of unit trust schemes authorised under the provisions of the Prevention of Fraud (Investments) Act 1958 [c], or of the Prevention of Fraud (Investments) Act (Northern Ireland) 1940 [d], and the only restrictions accepted thereunder relate to the management of, or the sale and purchase of units of, unit trust schemes authorized as aforesaid.

10. An agreement arising by virtue of a recommendation made by an association such as is described in section 112(1) of the Act of 1973 and which is either represented on the body known as the Panel on Take-overs and Mergers or is a member of such an association represented thereon, being a recommendation to comply with the provisions of the City Code on Take-overs and Mergers or a recommendation made for the purpose of Implementing a decision of the Panel.

[a] 1974 c. 49.

[b] 1968 c. 6(N1).

[c] 1958 c. 45.

[d] 1940 c. 9(N1).

PARLIAMENTARY DEBATE

973 Parl. Deb. H.C.
(5th ser.) 1354
(Nov. 15, 1979)

ORDERS OF THE DAY

PROTECTION OF TRADING INTERESTS BILL

Order for Second Reading read.

4.43 pm

The Secretary of State for Trade (Mr. John Nott):

I beg to move, That the Bill be now read a Second time.

I am moving today the Second Reading of a Bill which deals with matters vital to the interests of the United Kingdom as an international trading nation. While I hope that it will command general support, I recognise that the Bill in some respects breaks fresh legal ground. I hope that I shall be able to persuade the House that it is justified. In view of the complicated nature of and the particular background to the Bill, I fear that I shall have to delay the House for rather longer than I would wish. It is, however, important that I set out the full facts underlying this proposed new piece of legislation.

My objective in introducing this Bill is to reassert and reinforce the defenses of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us. From our point of view, the most objectionable method by which this is done is by the extra-territorial application of domestic law. In theory this is a general problem, since many countries have policies which, given the occasion and the inclination, they might seek to enforce on persons located, or engaged in activities, beyond the normal bounds of national jurisdiction as recognized in international law.

In effect, however, the practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America. We have not suddenly become belligerent or confrontational in regard to this most powerful and valued friend. The Bill is a response to a sitaution of a very particular nature which has been developing over several decades and which in the past few years has become much more acute. It also emphasises that, in so far as the application or enforcement of any foreign law requires the active assistance or passive acquiescence of the United Kingdom the overseas country in question must have regard to the trading interests of the United Kingdom.

The Government recognise that the United Kingdom bears a heavy responsibility in the maintenance of the open international trading system in what is, nevertheless, an increasingly interdependent trading world. We have to maintain the principle of enterprise and competition between undertakings within individual nations and between trading nations themselves. At the same time, the increasing volume of international trade, the swiftness of modern communications, the international nature of many enterprises and increasing specialization on the part of industrial nations means that, while trading nations are interdependent in a real sense, their economic and commercial policies are bound sometimes to come into conflict. We recognise this, and we believe that the right way to sort out the resulting differences of policy and approach is by intergovernmental discussion and negotiation through the established international organisations by which trade policy is coordinated multilaterally, as well as in bilateral contacts and negotiations between Governments.

I have to say that the United States has shown a tendency in certain respects over the past three decades increasingly to try to mould the international economic and trading world in its own image. There are certain

well-established and deeply held principles in United States economic thought and law which, no doubt from the best motives, the United States seeks to have observed by its trading partners elsewhere in the world. This attitude is shared by the United States legislature, its courts and its enforcement agencies, all of which have contributed to the situation to which we object. Pre-eminently this arises in the field of anti-trust, or competition, law, and accordingly much of my speech will be devoted to that subject. But, as I shall explain later, there are many other areas in which the United States seeks to impose its own law or concept of good practice on those who do business with it, and even on those who do not do so in any direct sense.

The basic anti-trust law is the Sherman Act, which was passed in 1890. The wording of the Act outlaws restraints of trade in very general terms.

In the first United States Supreme Court case in 1909 involving the extra-territorial reach of the United States anti-trust laws, the court spoke of the general and almost universal rule that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done. It stated that all legislation was prima facie territorial, and that it would be an interference with the authority of another sovereign, and contrary to the comity of nations, for a nation to apply its own laws to acts done outside its jurisdiction. This was a clear expression of the territorial principle of national jurisdiction which we in the United Kingdom still observe.

However, by 1945 the United States courts had changed the situation drastically. In a case involving a Canadian and five European aluminum producers who joined together to allocate the amount of aluminum to be produced, the United States alleged that there had been an effect on the price of aluminum in the United States of America. In giving judgment, the court stated that

> "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends".

The court found the agreement between those non-United States companies, which was an action performed entirely outside the United States of America, to be illegal under the Sherman Act and punishable according to the provisions of that law.

Since that time this so-called "effects doctrine" has been applied and extended by the United States courts and regulatory agencies. Furthermore, in applying this doctrine the United States courts have paid comparatively little attention to the interests and policies of foreign Governments where these have been in conflict with those of the United States. Even if they had done so, it would, in my view, be fundamentally unsatisfactory for United States law unilaterally to pass judgment on economic problems which by their very nature are of concern to more than one country. The wide extent and fundamental uncertainty of this claimed reach of United States law through this pernicious extra-territorial effects doctrine has created uncertainty for international industry in this country and elsewhere. The views which I express on this subject are not held just by our Government: they are held and deeply felt in Canada, Australia, South Africa and other countries of the EEC.

However, we have further objections beyond this to the impact of the anti-trust laws on our international trade. Not only are they enforced by criminal sanctions in proceedings initiated by an enforcement agency, but they confer a civil right to triple damages on parties injured by acts unlawful under them. We regard this civil sanction—I refer here to triple damages—as being penal rather than compensatory, and consequently we consider that in international dealings at least these proceedings should be subject to the limitations that we would regard

as appropriate to criminal proceedings. In fact, they are subject to no such limitations. The plaintiff is given what appear to us to be unfair advantage. The defendant need not be present in the United States in order for the proceedings to be brought and heard there; whether or not he appears, he is subject to discovery; and failure to appear is deemed to be an admission of guilt. Furthermore, the United States system of class actions and the so-called "contingency fee" method of payment to lawyers combine to prejudice the defendants. Contingency fees encourage lawyers to invest their time and expertise in stimulating litigation by identifying potentially successful plaintiffs and prosecuting their cases for all they are worth.

As a matter of public policy in this country, we have always opposed the contingency fee system on the ground that it increases the partiality of the lawyer representing one party. Further, the consequences of such a system are exacerbated by the procedure of class actions. While the class action itself may be a sensible way of determining the rights of a large number of people in the same position, in practice the larger the class of plaintiffs involved, the greater the source of potential profit to the litigation lawyers.

The penalties that may be exacted in such civil antitrust proceedings are often wholly disproportionate, particularly since the government may either have brought criminal proceedings already or, for good reasons, rejected that option.

Indeed, the nature of the penal element in civil damages seems to come perilously near to being in conflict with the Bill of Rights 1689, which said:

> "That excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted."

The eighth amendment to the constitution of the United States, passed in the United States Bill of Rights in 1791,

includes expressions from our Bill of Rights. It is therefore widely felt that penal and exorbitant damages—triple damages—are possibly equivalent to "excessive fines" as set down in the Bill of Rights.

The second area in which difficulties arise is the powers possessed by many agencies in their execution of the duties laid on them by the United States Congress. Those powers may lead them on occasion to pursue inquiries or launch proceedings against persons, who, according to our view of international law, are outside the jurisdiction of the United States. Successive Governments have been obliged to intervene in such cases on behalf of our traders. These agencies include the Federal Trade Commission, the Securities and Exchange Commission, the Federal Maritime Commission, the Commodity Futures Trading Commission, and others.

The third objectionable practice on the part of the United States is that from time to time it treats foreign subsidiaries of United States companies, or even companies in which United States citizens hold a number of shares, though not enough to make the companies subsidiaries of United States companies, as being for that reason subject to United States jurisdiction. Such companies may be required to behave in certain ways, including providing information for the purposes of United States domestic regulatory agencies.

That means that in furtherance of a United States Government policy, which may or may not be shared by other countries, companies domiciled and operating outside the United States, under the laws of other countries, are required to take actions which can and do have a direct bearing on their commercial well-being and on the jobs of, for example, British citizens who work for them in this country. No British Government can accept that British jobs should be harmfully affected by such legislative actions of the United States Congress or enforcement actions of United States Government agencies.

This is not my normal sort of speech. I hope that hon. Members will give me the benefit of any doubt. We are engaged in a delicate and complicated legal matter. I have written down my words and am choosing them with great care.

Mr. John Prescott (Kingston upon Hull, East): I have sympathy with the Secretary of State's argument that it is a legal matter, but I hope that he will address himself to the arguments of economics and competition.

Mr. Nott: I have explained at length why we object to certain of the practices of the United States in the legal and economic field. I hope that I have made it clear that while to the casual observer it may not appear a matter of special importance that such and such a company is involved in a United States anti-trust inquiry, or is subject to investigation by some other agency of the United States government, real issues of national interest are involved for us. The issues are not theoretical or merely of interest to lawyers. I will give an example that will interest the hon. Member for Kingston upon Hull, East (Mr. Prescott).

Last June, a United States grand jury handed down criminal indictments against several shipping companies and individuals, including two consortia in which there is a substantial British element—Cunard and Bibby Lines—and two British nationals. The indictments alleged that the consortia had violated United States anti-trust legislation by establishing rates without the approval of the relevant United States regulatory authority, the Federal Maritime Commission. The Government reacted strongly against the handing down of these indictments, as did the previous Administration to the institution of the grand jury investigation itself. The policy of the British Government, along with that of all European Governments, has been to avoid detailed regulatory intervention in the commercial aspects of international shipping. We believe that to be the best way of achieving efficient and

effective shipping services and protecting the interest of the consumer.

There is the important point, too, that shipping is an international business. Once one starts regulating other than on an agreed basis, many jurisdictional problems can arise. Our own restrictive practices legislation reflects the policy that I have described.

In reference to this case, a senior official of the United States Department of Justice recently recalled that fines of over $6 million were imposed—the largest in the history of the Sherman Act. That was against our shipping companies. He continued that this upward trend was continuing and that, indeed, the antitrust division might well be on its way to becoming a "profit centre" for the Department of Justice. I think that we can draw our own conclusions from that attitude.

Mr. Eric Ogden (Liverpool, West Derby): Presumably, the Secretary of State is not saying that he is against profit.

Mr. Nott: I do not think that the High Court of Justice and the Court of Appeal would consider themselves as profit centres. Generally I like a profit motive to be available, at least to business men, but that is a different matter from seeking to make the Department of Justice a profit centre.

The shipping companies decided to plead "no contest", because of the great cost of litigation in cash and managerial time, and so the case against them was not proved in court. Nevertheless, the highest possible fines were still imposed. Those companies now also face the threat of further proceedings and more sizeable fines by the Federal Maritime Commission for effectively the same offenses. On top of that, civil triple damage proceedings have been commenced against them in which the claims may be over $1.5 billion in triple damage suits.

Such claims are no mere bogy. Some United States paper producers have recently paid $500 million in fines and damages as a result of anti-trust proceedings. The consequences for the shipping companies are potentially financially crippling. No Government can stand by and allow a vital industry to be threatened in that way when we contest the very basis of the United States action.

In another triple damage anti-trust case currently going on in the United States of America, where total damages of up to $6 billion are being claimed, yet another major United Kingdom company—Rio Tinto-Zinc—is at risk. The background to the case is worth explaining.

In 1964, when the United States uranium mining industry was threatened by foreign imports, it was afforded long-term protection by means of an effective United States Government ban on the import of uranium for use in United States reactors. At a stroke that denied to the non-United States producers about three-quarters of the world market for uranium. During the late 1960s and early 1970s, Westinghouse, which is the United States of America's biggest power engineering company, concluded a number of contracts relating to the construction of nuclear power stations in which it agreed to supply future quantities of uranium but failed to take the precaution of buying forward to cover its commitments.

In the meantime, the uranium producers outside the United States of America had, with the positive encouragement of Governments involved, taken some action to protect their markets outside the United States of America in the light of the United States ban and the generally depressed market conditions, which it aggravated.

Following a large and unexpected increase in the price of uranium after 1973, Westinghouse found itself in serious difficulties. In September 1975, it gave notice that its uranium supply contracts had become "commercially impracticable". It blamed the large oil price rise in 1973 and claimed that the cause was the

> "actions of foreign uranium producing countries and companies that have significantly curtailed international uranium supplies".

This led to Westinghouse being sued by the public power utilities. The total amount of compensation claimed was about $2 billion. Westinghouse took this figure as the basis for a triple damage anti-trust claim against the uranium producers. I note that Westinghouse had not included amongst the defendants the French producers that were involved. I cannot regard that as an accident, in view of Westinghouse's interests in France.

The case is still going on, but nine of the foreign defendants, including RTZ, have not accepted that the United States court has jurisdiction and have not appeared. Westinghouse is trying to recover damages from those foreign companies even before a trial on the merits has been heard. That is not scheduled to take place until 1981.

The actions of the non-United States uranium producers reflected policies of the Governments of the uranium-producing countries involved and were a direct result of the earlier United States protectionist embargo. Even the United States Government, despite their general claims to extra-territorial jurisdiction, decided to take only the most modest proceedings against one United States company in this case.

Why, then, should a United States company be able to drag foreign companies, including one of our leading companies, before a United States court in order to obtain massive damages for activities by non-United States companies outside the United States at a time when they were even denied access to the United States market?

I could give further examples of how various regulatory agencies in the United States are attempting to extend

their reach to companies located outside the United States of America. The SEC and the Commodity Futures Trading Commission are both making moves to extend the reach of their jurisdiction beyond the United States, and Congress has recently passed legislation dealing with rebating in the shipping industry, which is legal in Europe but outlawed by the Federal Maritime Commission. Penalties could involve port closure for particular shipping lines.

I must emphasise that we do not dispute the right of the United States or any other nation to pass and enforce what economic laws it likes to govern business operating fully in its own country. Our objection arises only at the point when a country attempts to achieve the maximum beneficial regulation of its own economic environment by ensuring that all those having any contract with it abide by its laws and legal principles.

In other words, there is an attempt to export economic policy and law to persons domiciled in countries that may have different legal systems and priorities without recognising that those countries have the right to lay down the standards to be observed by those trading within their jurisdiction.

Mr. Clinton Davis (Hackney, Central): How does the right hon. Gentleman view the American anti-Arab boycott legislation? Does he feel that it is an example of the extra-territorial jurisdiction of which he complains? It is clearly a matter with wide international ramifications.

Mr. Nott: The answer to the question is "Yes". I consider that the United States anti-boycott legislation comes within the area that I am describing. I do not think that I need to go further.

Mr. Peter Emery (Honiton): Can my right hon. Friend assure the House, in view of the peculiar nature of the legislation, which is obvious from my right hon.

Friend's speech, that all diplomatic channels and negotiations have been carried through between the British and American Governments in order to try to overcome the problems and to avoid the necessity of the Bill being produced?

I am sure that the answer must be "Yes", but it is important that that should be spelt out so that those coming to grips with the legislation may understand that successive British Governments have done everything possible to rectify the situation by normal negotiations.

Mr. Nott: The right hon. Member for Lanarkshire, North (Mr. Smith) and the hon. Member for Hackney, Central (Mr. Davis) will confirm that we have several decades of diplomatic representation on this subject behind us, as have most other Western countries. It is not just us who are offended by the extra-territorial jurisdiction claimed by the United States under the effects doctrine which came rather late into the Sherman Act proceedings.

Since the Government came to power, I have made diplomatic representations on the shipping case and the Government have been involved in the uranium case. The only aspect of the Bill that we have not debated in full with the United States authorities is clause 6, which involves the recovery of triple damage suits in this country.

Since we published the Bill, the United States ambassador has seen me and made certain representations and I have given him a response. Apart from that, the general underlying seriousness of the British Government's view towards triple damage suits and the extra-territorial reach of the United States has been a matter of diplomatic representations by successive Administrations over the years, but it has achieved nothing to speak of.

Voices are continually being raised in the United States against trends in that country. Last month, Mr. George

Ball, former Under-Secretary of State and former permanent representative at the United Nations, who is well known to the House, said that during his years in the State Department he had encountered no set of problems that evoked greater frustration and exasperation from foreign Governments than the United States' occasionally excessive bureaucratic zeal on trying to extend its laws and regulations extra-territorially.

Mr. Ball pointed out that the United States would resent it deeply if other nations tried to impose their peculiar policies and prejudices on the USA. He concluded that, if the United States continued to try to extend its jurisdiction beyond its borders, the whole system of international comity could break down.

There are many other statements by United States lawyers and citizens before Senate committees that I could quote, but I have already gone on for too long and time forbids it.

Perhaps, surprisingly, our proposals have received a remarkable good reception in the United States press. *The Washington Post* recently carried an editorial entitled "Anti-trust: The New Imperialism". It concluded:

> "the Sherman Anti-trust Act is not a suitable instrument for the regulation of world trade. Maintaining international competition is the proper business of diplomats and negotiation, not federal judges and litigation."

There have been several useful articles on the subject in the United States, where there is a general body of support for non-United States feeling about the effects doctrine.

The law does not operate in vacuum. It is not something only for debates on jurisprudence between academic lawyers. The law is there to defend the interests of citizens and it is essential that we look on the Bill as an

attempt to deal with a problem which we have failed to deal with at diplomatic level over many years. It is a genuine attempt to protect British economic interests, operating not necessarily even in the United States.

Mr. Ivan Lawrence (Burton): My right hon. Friend has made clear that an appalling situation exists. It is appalling that we should be driven by our close friends the Americans to have to take this sort of defensive action.

The situation has existed for a long time. Why has no action been taken in previous decades? Presumably a considerable number of British companies have suffered from the effects of United States legislation.

Mr. Nott: I cannot answer for my predecessors. I admit that our approach in clause 6 is rather novel and will, no doubt, cause a fair amount of fluttering in the legal dovecotes. I hope that when the Bill goes to another place senior and distinguished members of the legal profession will state their views.

I do not know why my predecessors have felt unable to take the action that I am proposing. I believe that the time has come to do so. There are two particularly prominent examples in the courts in the United States and it is appropriate to move forward in the way that I propose.

We already have powers under a 1964 Act to deal with certain aspects of the extra-territorial reach of United States laws, but that Act was passed in response to a specific and offensive instance of extra-territorial claim to jurisdiction by the United States in shipping matters. It proved useful in a number of cases in which we have been able to ensure that commercial documents in the United Kingdom have not been available in response to United States requirements, but we have found that, in the light of recent developments in the United States, the 1964 Act is no longer adequate to protect our interests.

I should tell the House that we have received representations from the United States Government about a number of aspects of the Bill, particularly the extension of the powers to prevent the production of documents from outside the United States, the total non-enforcement of multiple damage judgements, and the rights of recovery conferred by clause 6. We are examining with care the points which they have raised with us on the publication of the Bill.

I stress again that we are, as ever, ready and willing to try to resolve problems underlying our commercial relations with the United States, or for that matter any other country, by discussion and negotiation. We think this is the right way, particularly as both we and the United States share a common commitment to a generally liberal attitude to world trade. For example, although the anti-trust action against British shipping interests has had an influence on certain provisions of the Bill, I have made it clear when expressing my strong objections to the action of the United States authorities in that case that we stood willing to continue our discussions with them with the aim of reaching agreement between us on shipping matters. Discussions have taken place in Washington in the last fortnight and we hope that the United States will respond to this approach. But the House will understand that any future changes in United States practice cannot affect the cases of United Kingdom companies already before the courts, and there is no alternative but to go forward with this Bill at the same time.

The Bill, with its explanatory memorandum, is before the House and I felt that it was more important to explain to the House the background to the Government's decision to bring this measure forward, rather than to give a clause by clause exposition of the Bill. I can do so, but I think that we can leave that to Committee. The memorandum sets it out relatively clearly.

If the House does not insist that I go through the Bill clause by clause, I will make some general remarks on this Government's attitude to competition policy and its relationship to United States anti-trust policy. To some people it may seem odd for a Government committed to the strengthening of British competition policy to propose a measure to impede the enforcement by our courts of the competition policies of other countries. There is no incompatibility between the Competition Bill and this Bill. Competition law varies from State to State in accordance with their economic and other priorities, and there is no international consensus on what competition policy should be.

Lord Wilberforce said, when giving judgment in the House of Lords:

> "It is axiomatic that in anti-trust matters the policy of one State may be to defend what it is the policy of another State to attack".

That was a quite useful *obiter dictum* from Lord Wilberforce. Without needing here to go quite that far—and we are not going quite that far—I would say that competition law is a branch of public law on which, by contrast with most fields of private civil law, there can be no presumption that one State will enforce the policy and laws of another State—just as States generally decline to assist in the enforcement of the taxation law of other States. On competition judgments, the existing situation, under ancient principles of our law, is that our courts will not enforce criminal penalties in the laws of other States, whether on competition or on anything else. Clause 5 of this Bill will make clear that triple damage judgments will similarly not be enforced, and the discretionary power of subsection (4) and (5) would be available to specify other foreign competition policy judgments as non-enforceable, if the other powers proved insufficient to prevent the sort of mischiefs of which I have spoken. These are

points of important legal principle and do not affect the political commitment, which I believe we share with the United States, of operating and enforcing an effective competition policy in each of our two countries.

I say to the House that the Bill is not anti-American, or indeed anti-anybody. I hope that I have made that clear. It is designed to protect and not to provoke. But it deals with matters where the law and legal practice of the United States have become a matter of international concern—not only to us but to other nations, many of which have adopted their own means of looking after themselves. It is a legitimate exercise of our own sovereignty.

The Government believe that negotiation and discussion between sovereign Governments are always the best way to settle international trading problems and disputes, and therefore I hope that I shall have little cause to use the discretionary powers conferred by the Bill. But I wish to leave no doubt that I will be prepared to use it in the defence of the legitimate economic and trading interests of our country. I do not rule out further legal provisions unless we can solve these long-standing problems in a more satisfactory way than we have been able to do up to now.

I commend this Bill to the House.

THE PROTECTION OF TRADING INTERESTS ACT 1980 (1980 c. 11)

An Act to provide protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom [20th March 1980].

1. Overseas measures affecting United Kingdom trading interests

(1) If it appears to the Secretary of State—

(a) that measures have been or are proposed to be taken by or under the law of any overseas country for regulation or controlling international trade; and

(b) that those measures, in so far as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom,

the Secretary of State may by order direct that this section shall apply to those measures either generally or in their application to such cases as may be specified in the order.

(2) The Secretary of State may by order make provision for requiring, or enabling the Secretary of State to require, a person in the United Kingdom who carries on business there to give notice to the Secretary of State of any requirement or prohibition imposed or threatened to be imposed on that person pursuant to any measures in so far as this section applies to them by virtue of an order under subsection (1) above.

(3) The Secretary of State may give to any person in the United Kingdom who carries on business there such directions for prohibiting compliance with any such requirement or prohibition as aforesaid as he considers appropriate for avoiding damage to the trading interests of the United Kingdom.

(4) The power of the Secretary of State to make orders under subsection (1) or (2) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Directions under subsection (3) above may be either general or special and may prohibit compliance with any requirement or prohibition either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such manner as appears to the Secretary of State to be appropriate.

(6) In this section "trade" includes any activity carried on in the course of a business of any description and "trading interests" shall be construed accordingly.

2. Documents and information required by overseas courts and authorities

(1) If it appears to the Secretary of State—

(a) that a requirement has been or may be imposed on a person or persons in the United Kingdom to produce to any court, tribunal or authority of an overseas country any commercial document which is not within the territorial jurisdiction of that country or to furnish any commercial information to any such court, tribunal or authority; or

(b) that any such authority has imposed or may impose a requirement on a person or persons in the United Kingdom to publish any such document or information,

the Secretary of State may, if it appears to him that the requirement is inadmissible by virtue of subsection (2) or (3) below, give directions for prohibiting compliance with the requirement.

(2) A requirement such as is mentioned in subsection (1) *(a)* or *(b)* above is inadmissible—

(a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom, or

(b) If compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country.

(3) A requirement such as is mentioned in subsection (1) *(a)* above is also inadmissible—

(a) if it is made otherwise than for the purposes of civil or criminal proceedings which have been instituted in the overseas country, or

(b) if it requires a person to state what documents relevant to any such proceedings are or have been in his possession, custody or power or to produce for the purposes of any such proceedings any documents other than particular documents specified in the requirement.

(4) Directions under subsection (1) above may be either general or special and may prohibit compliance with any requirement either absolutely or in such cases or subject to such conditions as to consent or otherwise as may be specified in the directions; and general directions under that subsection shall be published in such

manner as appears to the Secretary of State to be appropriate.

(5) For the purposes of this section the making of a request or demand shall be treated as the imposition of a requirement if it is made in circumstances in which a requirement to the same effect could be or could have been imposed; and

(a) any request or demand for the supply of a document or information which, pursuant to the requirement of any court, tribunal or authority of an overseas country, is addressed to a person in the United Kingdom; or

(b) any requirement imposed by such a court, tribunal or authority to produce or furnish any document or information to a person specified in the requirement,

shall be treated as a requirement to produce or furnish that document or information to that court, tribunal or authority.

(6) In this section "commercial document" and "commercial information" mean respectively a document or information relating to a business of any description and "document" includes any record or device by means of which material is recorded or stored.

3. Offenses under §§ 1 and 2

(1) Subject to subsection (2) below, any person who without reasonable excuse fails to comply with any requirement imposed under subsection (2) of section 1 above or knowingly contravenes any directions given under subsection (3) of that section or section 2(1) above shall be guilty of an offence and liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction, to a fine not exceeding the statutory maximum.

(2) A person who is neither a citizen of the United Kingdom and Colonies nor a body corporate incorporated in the United Kingdom shall not be guilty of an offence under subsection (1) above by reason of anything done or omitted outside the United Kingdom in contravention of directions under section 1(3) or 2(1) above.

(3) No proceedings for an offence under subsection (1) above shall be instituted in England, Wales or Northern Ireland except by the Secretary of State or with the consent of the Attorney General or, as the case may be, the Attorney General for Northern Ireland.

(4) Proceedings against any person for an offence under this section may be taken before the appropriate court in the United Kingdom having jurisdiction in the place where that person is for the time being.

(5) In subsection (1) above "the statutory maximum" means—

(a) in England and Wales and Northern Ireland, the prescribed sum within the meaning of [section 32 of the Magistrates' Courts Act 1980] (at the passing of this Act £1,000);

(b) (*applies to Scotland*);

and for the purposes of the application of this subsection in Northern Ireland the provisions of [the said Act of 1980] relating to the sum mentioned in paragraph (a) shall extend to Northern Ireland.

4. Restriction of Evidence (Proceedings in Other Jurisdictions) Act 1975

A court in the United Kingdom shall not make an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 for giving effect to a request

issued by or on behalf of a court or tribunal of an overseas country if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial shall be conclusive evidence of that fact.

5. Restriction on enforcement of certain overseas judgments

(1) A judgment to which this section applies shall not be registered under Part II of the Administration of Justice Act 1920 or Part 1 of the Foreign Judgments (Reciprocal Enforcement) Act 1933 and no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such a judgment.

(2) This section applies to any judgment given by a court of an overseas country, being—

(a) a judgment for multiple damages within the meaning of subsection (3) below;

(b) a judgment based on a provision or rule of law specified or described in an order under subsection (4) below and given after the coming into force of the order; or

(c) a judgment on a claim for contribution in respect of damages awarded by a judgment falling within paragraph *(a)* or *(b)* above.

(3) In subsection (2)*(a)* above a judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favor the judgment is given.

(4) The Secretary of State may for the purposes of subsection (2)*(b)* above make an order in respect of

any provision or rule of law which appears to him to be concerned with the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description or to be otherwise concerned with the promotion of such competition as aforesaid.

(5) The power of the Secretary of State to make orders under subsection (4) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(6) Subsection (2)*(a)* above applies to a judgment given before the date of the passing of this Act as well as to a judgment given on or after that date but this section does not affect any judgment which has been registered before that date under the provisions mentioned in subsection (1) above or in respect of which such proceedings as are there mentioned have been finally determined before that date.

6. Recovery of awards of multiple damages

(1) This section applies where a court of an overseas country has given a judgment for multiple damages within the meaning of section 5(3) above against

(a) a citizen of the United Kingdom and Colonies; or

(b) a body corporate incorporated in the United Kingdom or in a territory outside the United Kingdom for whose international relations Her Majesty's Government in the United Kingdom are responsible; or

(c) a person carrying on business in the United Kingdom,

(in this section referred to as a "qualifying defendant") and an amount on account of the damages has been paid by the qualifying defendant either to the party in whose

favour the judgment was given or to another party who is entitled as against the qualifying defendant to contribution in respect of the damages.

(2) Subject to subsections (3) and (4) below, the qualifying defendant shall be entitled to recover from the party in whose favour the judgment was given so much of the amount referred to in subsection (1) above as exceeds the part attributable to compensation; and that part shall be taken to be such part of the amount as bears to the whole of it the same proportion as the sum assessed by the court that gave the judgment as compensation for the loss or damage sustained by that party bears to the whole of the damages awarded to that party.

(3) Subsection (2) above does not apply where the qualifying defendant is an individual who was ordinarily resident in the overseas country at the time when the proceedings in which the judgment was given were instituted or a body corporate which had its principal place of business there at that time.

(4) Subsection (2) above does not apply where the qualifying defendant carried on business in the overseas country and the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country.

(5) A court in the United Kingdom may entertain proceedings on a claim under this section notwithstanding that the person against whom the proceedings are brought is not within the jurisdiction of the court.

(6) The reference in subsection (1) above to an amount paid by the qualifying defendant includes a reference to an amount obtained by execution against his property or against the property of a company which (directly or indirectly) is wholly owned by him; and references in that subsection and subsection (2) above to the party in whose favour the judgment was given or

to a party entitled to contribution include references to any person in whom the rights of any such party have become vested by succession or assignment or otherwise.

(7) This section shall, with the necessary modifications, apply also in relation to any order which is made by a tribunal or authority of an overseas country and would, if that tribunal or authority were a court, be a judgment for multiple damages within the meaning of section 5(3) above.

(8) This section does not apply to any judgment given or order made before the passing of this Act.

7. Enforcement of overseas judgment under provision corresponding to § 6

(1) If it appears to Her Majesty that the law of an overseas country provides or will provide for the enforcement in that country of judgments given under section 6 above, Her Majesty may by Order in Council provide for the enforcement in the United Kingdom of judgments given under any provision of the law of that country corresponding to that section.

(2) An Order under this section may apply, with or without modification, any of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

8. Short title, interpretation, repeals and extent

(1) This Act may be cited as the Protection of Trading Interests Act 1980.

(2) In this Act "overseas country" means any country or territory outside the United Kingdom other than one for whose international relations Her Majesty's Government in the United Kingdom are responsible.

(3) References in this Act to the law or a court, tribunal or authority of an overseas country include, in the case of a federal state, reference to the law or a court,

tribunal or authority of any constituent part of that country.

(4) References in this Act to a claim for, or to entitlement to, contribution are references to a claim or entitlement based on an enactment or rule of law.

(5) The Shipping Contracts and Commercial Documents Act 1964 (which is superseded by this Act) is hereby repealed, *together with paragraph 18 of Schedule 2 and paragraph 24 of Schedule 3 to the Criminal Law Act 1977 (which contain amendments of that Act).*

(6) Subsection (5) above shall not affect the operation of the said Act of 1964 in relation to any directions given under that Act before the passing of this Act.

(7) This Act extends to Northern Ireland.

(8) Her Majesty may by Order in Council direct that this Act shall extend with such exceptions, adaptations and modifications, if any, as may be specified in the Order to any territory outside the United Kingdom, being a territory for the international relations of which Her Majesty's Government in the United Kingdom are responsible.

Competition Act 1980

(1980 c. 21)

An Act to abolish the Price Commission; to make provision for the control of anti-competitive practices in the supply and acquisition of goods and the supply and securing of services; to provide for references of certain public bodies and other persons to the Monopolies and Mergers Commission; to provide for the investigation of prices and charges by the Director General of Fair Trading; to provide for the making of grants to certain bodies; to amend and provide for the amendment of the Fair Trading Act 1973; to make amendments with respect to the Restrictive Trade Practices Act 1976; to repeal the remaining provisions of the Counter-Inflation Act 1973; and for purposes connected therewith. [3rd April 1980]

* * * *

Anti-competitive practices

2.—(1) The provisions of sections 3 to 10 below have effect with a view to the control of anti-competitive practices, and for the purposes of this Act a person engages in an anti-competitive practice if, in the course of business, that person pursues a course of conduct which, of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply or securing of services in the United Kingdom or any part of it.

(2) To the extent that a course of conduct is required or envisaged by a material provision of, or a material recommendation in, an agreement which is registered or subject to registration under the Restrictive Trade Practices Act 1976, that course of conduct shall not be regarded

as constituting an anti-competitive practice for the purposes of this Act; and for the purposes of this subsection—

(*a*) a provision of an agreement is a material provision if, by virtue of the existence of the provision (taken alone or together with other provisions) the agreement is one to which that Act applies; and

(*b*) a recommendation is a material recommendation in an agreement if it is one to which a term implied into the agreement by any provision of section 8 or section 16 of that Act (terms implied into trade association agreements and services supply association agreements) applies.

(3) For the purposes of this Act, a course of conduct does not constitute an anti-competitive practice if it is excluded for those purposes by an order made by the Secretary of State; and any such order may limit the exclusion conferred by it by reference to a particular class of persons or to particular circumstances.

(4) Without prejudice to the generality of subsection (3) above, an order under that subsection may exclude the conduct of any person by reference to the size of his business, whether expressed by reference to turnover, as defined in the order, or to his share of a market, as so defined, or in any other manner.

(5) For the purpose only of enabling the Director General of Fair Trading (in this Act referred to as "the Director") to establish whether any person's course of conduct is excluded by virtue of any such provision of an order under subsection (3) above as is referred to in subsection (4) above, the order may provide for the application, with appropriate modifications, of any provisions of sections 44 and 46 of the Fair Trading Act 1973 (power of Director to require information).

(6) For the purpose of this section any two persons are to be treated as associated—

(*a*) if one is a body corporate of which the other directly or indirectly has control either alone or with other members of a group of interconnected bodies corporate of which he is a member, or

(*b*) if both are bodies corporate of which one and the same person or group of persons directly or indirectly has control;

and for the purposes of this subsection a person or group of persons able directly or indirectly to control or materially to influence the policy of a body corporate, but without having a controlling interest in that body corporate, may be treated as having control of it.

(7) In this section "the supply or securing of services" includes providing a place or securing that a place is provided other than on a highway, or in Scotland a public right of way, for the parking of a motor vehicle (within the meaning of the Road Traffic Act 1972).

(8) For the purposes of this Act any question whether, by pursuing any course of conduct in connection with the acquisition of goods or the securing of services by it, a local authority is engaging in an anti-competitive practice shall be determined as if the words "in the course of business" were omitted from subsection (1) above; and in this subsection "local authority" means—

(*a*) in England and Wales, a local authority within the meaning of the Local Government Act 1972, the Common Council of the City of London or the Council of the Isles of Scilly,

(*b*) in Scotland, a local authority within the meaning of the Local Government (Scotland) Act 1973, and

(*c*) in Northern Ireland, a district council established under the Local Government Act (Northern Ireland) 1972.

Treaty of Rome, Article 85(1)

[¶ 2005] **Article 85**

[Prohibited Practices]

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(*a*) directly or indirectly fix purchase or selling prices or any other trading conditions;

(*b*) limit or control production, markets, technical development, or investment;

(*c*) share markets or sources of supply;

(*d*) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(*e*) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

European Communities Act 1972 *

(1972 c. 68)

An Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar. [17 October 1972]

* * * *

General implementation of Treaties

2.—(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.

(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—

(a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by

means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid.

In this subsection "designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

(3) There shall be charged on and issued out of the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund the amounts required to meet any Community obligation to make payments to any of the Communities or member States, or any Community obligation in respect of contributions to the capital or reserves of the European Investment Bank or in respect of loans to the Bank, or to redeem any notes or obligations issued or created in respect of any such Community obligation; and, except as otherwise provided by or under any enactment,—

(a) any other expenses incurred under or by virtue of the Treaties or this Act by any Minister of the Crown or government department may be paid out of moneys provided by Parliament; and

(b) any sums received under or by virtue of the Treaties or this Act by any Minister of the Crown or government department, save for such sums as may be required for disbursements permitted by any other enactment, shall be paid into the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund.

(4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed

or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations.

(5) The limitations on the legislative power of the Parliament of Northern Ireland which are imposed by section 4(1)(4) (treaty matters) of the Government of Ireland Act 1920 shall not be construed to prevent that Parliament, on matters otherwise within their powers, from enacting provisions for any of the purposes mentioned in subsection (2) *(a)* and *(b)* above; and the references in that subsection to a Minister of the Crown or government department and to a statutory power or duty shall include a Minister or department of the Government of Northern Ireland and a power or duty arising under or by virtue of an Act of the Parliament of Northern Ireland.

(6) A law passed by the legislature of any of the Channel Islands or of the Isle of Man, or a colonial law (within the meaning of the Colonial Laws Validity Act 1865) passed or made for Gibraltar, if expressed to be passed or made in the implementation of the Treaties and of the obligations of the United Kingdom thereunder, shall not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of Parliament, passed or to be passed, that extends to the Island or Gibraltar or any provision having the force and effect of an Act there (but not including this section), nor by reason of its having some operation outside the Island or Gibraltar; and any such Act or provision that extends to the Island or Gibraltar shall be construed and have effect subject to the provisions of any such law.

Fair Trading Act 1973 *

(1973 c. 41)

* * * *

Monopoly situation in relation to supply of goods

6.—(1) For the purposes of this Act a monopoly situation shall be taken to exist in relation to the supply of goods of any description in the following cases, that is to say, if—

(a) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by one and the same person, or are supplied to one and the same person, or

(b) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group of interconnected bodies corporate, or are supplied to members of one and the same group of interconnected bodies corporate, or

(c) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group consisting of two or more such persons as are mentioned in subsection (2) of this section, or are supplied to members of one and the same group consisting of two or more such persons, or

(d) one or more agreements are in operation, the result or collective result of which is that goods of that description are not supplied in the United Kingdom at all.

(2) The two or more persons referred to in subsection (1)(*c*) of this section, in relation to goods of any description, are any two or more persons (not being a group of interconnected bodies corporate) who whether voluntarily or not, and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the production or supply of goods of that description, whether or not they themselves are affected by the competition and whether the competition is between persons interested as producers or suppliers or between persons interested as customers of producers or suppliers.

Monopoly situation in relation to supply of services

7.—(1) For the purposes of this Act a monopoly situation shall be taken to exist in relation to the supply of services of any description in the following cases, that is to say, if—

(a) the supply of services of that description in the United Kingdom is, to the extent of at least one-quarter, supply by one and the same person, or supply for one and the same person, or

(b) the supply of services of that description in the United Kingdom is, to the extent of at least one-quarter, supply by members of one and the same group of interconnected bodies corporate, or supply for members of one and the same group of interconnected bodies corporate, or

(c) the supply of services of that description in the United Kingdom is, to the extent of at least one-quarter, supply by members of one and the same group consisting of two or more such persons as are mentioned in subsection (2) of this section, or supply for members of one and the same group consisting of two or more such persons, or

(d) one or more agreements are in operation, the result or collective result of which is that services of that description are not supplied in the United Kingdom at all.

(2) The two or more persons referred to in subsection (1)(*c*) of this section, in relation to services of any de-

scription, are any two or more persons (not being a group of interconnected bodies corporate) who whether voluntarily or not, and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the supply of services of that description, whether or not they themselves are affected by the competition, and whether the competition is between persons interested as persons by whom, or as persons for whom, services are supplied.

(3) In the application of this section for the purposes of a monopoly reference, the Commission, or the person or persons making the reference, may, to such extent as the Commission, or that person or those persons, think appropriate in the circumstances, treat services as supplied in the United Kingdom if the person supplying the services—

(a) has a place of business in the United Kingdom, or

(b) controls the relevant activities from the United Kingdom, or

(c) being a body corporate, is incorporated under the law of Great Britain or of Northern Ireland,

and may do so whether or not those services would otherwise be regarded as supplied in the United Kingdom.

* * * *

Order of appropriate Minister on report on monopoly reference

56.—(1) The provisions of this section shall have effect where a report of the Commission on a monopoly reference not limited to the facts has been laid before Parliament in accordance with the provisions of Part VII of this Act, and the conclusions of the Commission set out in the report, as so laid,—

(*a*) include conclusions to the effect that a monopoly situation exists and that facts found by the Commission in pursuance of their investigations under

section 49 of this Act operate, or may be expected to operate, against the public interest, and

(*b*) specify particular effects, adverse to the public interest, which in their opinion those facts have or may be expected to have.

(2) In the circumstances mentioned in the preceding subsection the appropriate Minister may (subject to subsection (6) of this section) by order made by statutory instrument exercise such one or more of the powers specified in Parts I and II of Schedule 8 to this Act as he considers it requisite to exercise for the purpose of remedying or preventing the adverse effects specified in the report as mentioned in the preceeding subsection; and those powers may be so exercised to such extent and in such manner as the appropriate Minister considers requisite for that purpose.

(3) In determining whether, or to what extent or in what manner, to exercise any of those powers, the appropriate Minister shall take into account any recommendations included in the report of the Commission in pursuance of section 54 (3) (*b*) of this Act and any advice given by the Director under section 88 of this Act.

(4) Subject to the next following subsection, in this section "the appropriate Minister" means the Secretary of State.

(5) Where, in any such report as is mentioned in subsection (1) of this section, the person or one of the persons specified as being the person or persons in whose favour the monopoly situation in question exists is a body corporate fulfilling the following conditions, that is to say—

(*a*) that the affairs of the body corporate are managed by its members, and

(*b*) that by virtue of an enactment those members are appointed by a Minister,

then for the purpose of making any order under this section in relation to that body corporate (but not for the

purpose of making any such order in relation to any other person) "the appropriate Minister" in this section means the Minister by whom members of that body corporate are appointed.

(6) In relation to any such body corporate as is mentioned in subsection (5) of this section, the powers exercisable by virtue of subsection (2) of this section shall not include the powers specified in Part II of Schedule 8 to this Act.

REPORT TO CONGRESS ON THE TAXATION OF INCOME EARNED BY MEMBERS OF INSURANCE OR REINSURANCE SYNDICATES

[SEAL]

Department of the Treasury
February 1989

—Underwriters at Lloyd's of London are to be taxed as individuals.

—Individual underwriters (both U.S. and foreign) are deemed to have a "permanent establishment" in the U.S., which means that the income attributable thereto (both underwriting income and investment income) is subject to income tax on a net basis. There is only one level of U.S. tax imposed.

—All U.S. source investment income earned from premiums placed in U.S.-based trust accounts is taxed annually to each underwriter; underwriting profit and losses are taxed using the so-called 3-year accounting method applied to Lloyd's of London underwriters under British law.

—Under source rules agreed to in the closing agreement, some premiums paid in U.S. dollars (as the currency of convenience between the parties) are deemed to be for U.S. insurance (and subject to net-basis taxation under the agreement) even though the risk is not located in the U.S. and the insurance income would not otherwise be subject to U.S. tax. Conversely, a small amount of business written in currencies other than the U.S. dollar is exempted from tax, even though it involves U.S. situs risks.

—U.S. dollar premiums paid for U.S. reinsurance placed without the use of a U.S. broker are deemed not to be earned through a U.S. permanent establishment and are subject instead to the gross-basis insurance premium excise tax imposed under section 4371 of the Internal Revenue Code of 1986. (The U.S./U.K. income tax treaty relieves British residents from the excise tax, however.) All such reinsurance premiums are placed in a U.S. trust fund, and investment income earned by the premiums is subject to U.S. taxation under a formula set forth in the closing agreement. In addition, excise tax is collected on certain reinsurance policies obtained by underwriters at Lloyd's of London for reinsurance of U.S. risks.

* * * *

After 1850, the Lloyd's of London business expanded beyond marine insurance. By 1900, Lloyd's of London had evolved into a sophisticated insurance market, and the early years of this century were marked by rapidly increasing regulation and improved procedures. In 1902, Lloyd's of London began requiring deposits or guarantees from members. In 1903, the Committee of Lloyd's began requiring each new underwriter to put a portion of his premium income and investment yield in irrevocable 3-year trusts for the payment of underwriting liabilities and to assure the protection of policyholders. About 1908, Lloyd's of London began requiring audits of all syndicate accounts by an approved independent auditor. In 1909, the British Parliament enacted the Assurance Companies Act, which required deposits of money to be set aside by insurance companies and by every individual underwriter in relation to the amount of the risks underwritten. The Lloyd's Committee obtained an exemption from the deposit requirement for any underwriter who could produce a certificate of solvency and had provided the Committee with a deposit or guarantee equal to a year's premium income. This is the origin of the "means" test for qualification as a Lloyd's underwriter and of the deposit requirement that new members must satisfy; the "means" test and deposit requirement are more fully explained below.

Underwriters at Lloyd's of London began insuring U.S. risks at least by 1892. In 1939, the Committee of Lloyd's established the Lloyd's American Trust Funds ("LATF"), maintained by Citibank as trustee, into which all dollar premiums must be paid. The assets of the trust fund currently exceed $3 billion.

Originally, Lloyd's of London syndicates tended to be small; in 1856, most of the syndicates had no more than

three members with the largest having approximately six members. In 1952, sixteen syndicates had 100 members or more, and one syndicate had 300 members. Syndicates have continued to grow in number and size; for 1988 there were 376 syndicates, some of which included more than 1,000 members. Approximately 10 percent of the more than 33,500 Lloyd's of London underwriters in 1988 were U.S. residents or citizens.

B. Lloyd's of London Today

The Corporation of Lloyd's provides facilities and services to assist underwriters in carrying on their business. This Corporation does not underwrite any insurance. It acts within limits established by a Council composed of twelve active underwriting members of Lloyd's of London, eight nonworking members of Lloyd's and eight nonmembers of Lloyd's of London approved by the Governor of the Bank of England. The 1982 Lloyd's Act empowered the Council to control the admission and discipline of members; to set the members' reserve requirements beyond the amounts in the premiums trust funds [1] (*i.e.*, the Deposit Guaranty Funds, and the Central Fund); to set the fees and deposits required; to control and provide central accounting, claims adjustment, collections, and special services; to set restrictions on and standards for brokers, managing agents, and underwriters; to check for conformity and process all policies; and to have the power of general assessment on its members. The 1982 Act does not authorize the Council to direct the day-to-day insurance business transacted at Lloyd's of London.

Each member of Lloyd's of London must select a member's agent who assists the underwriter in selecting one or more managing syndicates. Through agency agreements, the member grants authority for underwriting activities to be conducted on his behalf. Members cannot conduct their insurance business directly. It is typical for a member to join a number of syndicates, which can vary from year to year, in order to spread his risks.

[1] These reserves are not reserves for tax purposes, but amounts required by Lloyd's of London to be set aside as security to ensure the payment of claims.

To obtain insurance at Lloyd's of London, a potential insured or his broker must contact a broker in London who is authorized by Lloyd's of London to place business at Lloyd's of London, or contact a broker outside London to whom, through an authorized London broker, certain Lloyd's of London underwriters have given written binding authority.

To be eligible to underwrite insurance at Lloyd's of London, an individual must apply and be sponsored by an existing member. The applicant must meet a "means" or net worth test to ensure that he will have sufficient assets to satisfy possible claims and to provide a basis for setting the member's premium limit.

Nos. 91-1111 & 91-1128

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1992

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

MERRETT UNDERWRITING AGENCY, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL., RESPONDENTS

ORDER ENTERED OCTOBER 5, 1992
GRANTING PETITIONS FOR CERTIORARI

The motion of Brokers & Reinsurance Markets Association for leave to file a brief as *amicus curiae* in No. 91-1111 is granted. The petition for a writ of certiorari in No. 91-1111 is granted limited to Questions 1 and 2 presented by the petition. The petition for a writ of certiorari in No. 91-1128 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.